legislative history is there any evidence that Congress intended to create a private cause of action for breach of this provision. Slip Opinion at 4141-4142 n. 8, Mansfield, J., dissenting.

Conclusion

For the reasons stated above, the Petition of Defendant-Appellee Heinold Commodities, Inc. for Rehearing En Banc should be granted.

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APPENDIX C

Petition of Clayton Brokerage Co. of St. Louis, Inc. for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs, Appellants,

v.

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, and ALFRED PENNISI,

Defendants-Appellees.

PETITION OF CLAYTON BROKERAGE CO. OF ST. LOUIS, INC. FOR REHEARING AND SUGGESTION OF APPROPRIATENESS OF A REHEARING IN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), one of the Defendants-Appellees herein, herewith petitions this Court to grant a rehearing in the above entitled cause and respectfully suggests that the question presented by this cause is one of exceptional importance which warrants the consideration of the Court sitting in Banc.

Appendix C

I. Petition for Rehearing

Clayton petitions the Court for a rehearing, pursuant to Rule 40, Fed. R. App. P., for the reason that in reaching its conclusion that a private right of action to enforce the provisions of the Commodity Exchange Act, 7 U.S.C. §§1-24 (the "CEA") exists on behalf of the Plaintiffs-Appellants herein, the Court misapprehended the decisions of the United States Supreme Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, —— U.S. ——, 62 L. Ed. 2d 146 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); and *Cannon* v. *University of Chicago*, 441 U.S. 667 (1979) and overlooked and misapprehended certain other matters, as set forth herein.

A. *The Proper Line Of Inquiry Is Whether Congress Intended To Create A Private Right of Action To Recover Damages Based Upon Violations Of The Commodity Exchange Act*

The Court's approach to determining whether a private right of action should be implied from the provisions of the CEA directly conflicts with the approach mandated by the decisions of the Supreme Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, —— U.S. ——, 62 L. Ed. 2d 146 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 61 L. Ed. 2d 82 (1979); and *Cannon* v. *University of Chicago*, 441 U.S. 667, 60 L. Ed. 2d 560 (1979). In the cited cases the Court held that the question of whether a private right of action for damages may be implied from a federal statute which makes no express provision for such right of action must be decided on the basis of whether Congress intended to create the private right of action sought to be maintained. *Transamerica Mortgage Advisors,*

Inc. v. *Lewis*, 62 L. Ed. 2d at 152; *Touche Ross & Co.* v. *Redington*, 61 L. Ed. 2d at 91; *Cannon* v. *University of Chicago*, 60 L. Ed. 2d at 560. The issue before this Court in this case, broadly stated, was whether a private right of action for damages should be implied from the CEA. This Court determined the issue, not by evaluating whether Congress intended to create a private right of action for violations of the CEA, but by determining "whether [Congress] intended *sub silentio* to alter the significance which had long been given [the provisions of the CEA] by making other changes in the Act." Slip Op. at 4061. By deciding the issue on this basis, the court has, in effect, condoned the decisions of other courts (those which this Court viewed as having previously determined the significance of the provisions of the CEA) in which those courts "assume[d] policy making authority vested by the Constitution in the Legislative Branch." *Cannon* v. *University of Chicago*, 60 L. Ed. 2d at 604 (Powell, J., dissenting). Moreover, the Court's decision ascribes an affirmative intent to Congressional inaction despite the fact that Congress has no duty "to disavow or disassociate itself from prior lower court decisions as if they were statutes enacted by it. *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1968)." Slip Op. at 4110. In so doing, this Court has, in effect, assisted "Congress to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation." *Id.* This clearly contravenes the letter and the spirit of the Supreme Court decisions cited above. It is the duty of Congress, not the courts, to take the affirmative action required to create a statutory right of action.

B. ***The Court Erred in Concluding that Congress Was Aware of and Ratified Decisions Upholding the Existence of the Private Right of Action Sought to be Enforced in This Case.***

This Court's decision rests primarily on the grounds that Congress was aware of those decisions finding a private right of action under the CEA which were rendered prior to the enactment of the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 (1974) and failed to take any action expressly renouncing those decisions. As the dissent in this case accurately pointed out, none of the cases decided prior to the enactment of the CFTC Act involved a claim analogous to the claims asserted against Clayton in this suit; most involved claims by customers against their brokers, not claims by speculators against unrelated brokers. Slip Op. at 4110. There was but a single suit, *Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.) *rev'd on other grounds sub nom., Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973) that even remotely resembled the private right of action here pursued by the Plaintiffs-Appellants; that suit involved a claim by a trader against an Exchange and ended without resolution of the issue of a private right of action under the CEA. During the extensive hearings and deliberations concerning the CFTC Act, none of the cases which found a private right of action existing under the CEA was cited to Congress for that proposition. The basis for the court's decision is too frail to support the conclusion reached. The court *presumes* that Congress was aware of the decisions (and, of course, that Congress *considered* the decisions), the court *presumes* that Congress would have spoken explicitly had it not in fact agreed with the decisions, and finally the court *presumes* that since Congress (based upon the court's presumptions) approved of the specific forms

of private damage actions which the courts had previously countenanced, Congress has approved all private rights of action for damages based upon violations of the CEA. At *most,* if Congress was, in fact, aware of the prior cases, Congress might be presumed to have acquiesced to suits by customers against their brokers; this is not such a suit and cannot be analyzed as such.

C. *Congress Acted Affirmatively to Deny the Existence of a Private Civil Action for Damages Against Futures Commission Merchants*

The presumptions upon which the court's conclusion rests are, in any event, rebuttable. Slip Op. at 4080. Congress's actions, which must be accorded greater weight than its inactions, demonstrate that in fact it did not intend that a private right of action should be available under the CEA against futures commission merchants such as Clayton.

Prior to 1974, as the court's opinion implicitly concedes, Slip Op. at 4062, there was nothing to indicate that Congress intended that private rights of action to be available under the CEA. In 1974, Congress dealt with proposed legislation which would have expressly created private rights of action for violation of the CEA. Extensive hearings were held concerning the proposed legislation and during those hearings Congress was urged to adopt the provisions which expressly would have created a private right of action. *See, e.g., Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry,* 93rd Cong. 2d Sess. 77, 118-119, 205, 737, 746. Congress, however, rejected the importunings of the witnesses who testified before it, and declined to enact those provisions. It did, however, enact Section 14 of the CEA, 7 U.S.C. §18, which created the reparations proceeding.

The court's opinion glosses over the rejection of these provisions, notwithstanding the decision of the Supreme Court on precisely this point in *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974) (which the Court finds, inexplicably, to be "inappropriate"). While it may be true that "unsuccessful attempts at legislation are not the best guides to legislative intent" Slip Op. at 4097, where, as here, such attempts are among the few ascertainable acts of Congress which in any respect indicate the Congressional intent sought to be ascertained, they must be accorded proper recognition.

Here, it must be presumed to indicate that the sponsors of the proposed legislation were unable to muster sufficient support to enact the provisions which would have established the private right of action which the Plaintiffs-Appellants pursue in this case.

The Court's disregard for the Congressional intent expressed in the enactment of the reparations procedure is equally improper. The two reasons cited for this treatment, an expressed Congressional intent to strengthen commodity futures regulation and the evolution of a jurisdictional savings clause which was included in the CFTC Act, are insufficient to justify the summary disregard of the careful limitations imposed on the private remedy which Congress did see fit to create. The legislative history to the reparations proceedings reflects that the reparations proceedings were considered by Congress to be the only available statutory remedies for violation of the act other than the arbitration procedures which the exchanges and the futures association were required to make available to injured commodity traders. H.R. Rep. No. 93-975, 93rd Cong., 2d Sess. 22, 83 (1974). In light of this assumption, the enactment of the reparations proce-

dure could only have been seen by Congress as strengthening the existing statutory scheme; Congress simply did not view private civil actions as an available statutory remedy. Thus, the enactment of reparations as a remedy to the exclusion of court actions is not at all inconsistent with the intent to strengthen the regulation of the futures industry.

The legislative history similarly provides an explanation for the jurisdictional savings provision which indicates that it was not intended to preserve private rights of action under the CEA. Rep. Rodino, Chairman of the House Judiciary Committee, described the provision as one which was intended to preserve the jurisdiction of the Courts over claims such as anti-trust claims, and contract and commercial law claims. *Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before The Senate Committee on Agriculture and Forestry,* 93rd Cong. 2d Sess. 259-60 (1974). No one in the entire course of the legislative history stated that the jurisdictional savings clause was intended to preserve private rights of action arising under the CEA.

Neither basis upon which the Court disregarded the clear implication of the enactment of the reparations procedure is substantiated by an examination of the applicable legislative history. Thus, even under the standard of analysis most favorable to the position of the Plaintiffs-Appellants, it is clear that Congress intended to deny the private right of action, the existence of which is at issue in this case.

II. Suggestion of Appropriateness of a Hearing by the Court In Banc

Clayton respectfully suggests that, pursuant to Rule 35 Fed. R. App. P., this case should be reheard by this Court in Banc.

This Court has recognized the importance of the issue presented by this case. Slip Op. at 4021. It is an issue on which the district courts, both within and without this Circuit, are sharply divided. Only two of the United States Courts of Appeal, this Court and the Court of Appeals for the Sixth Circuit, in *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith,* No. 77-1300 (6th Cir. 1980), have reached the issue. In each case, the decision rendered was reached by a divided court, with the dissenting Judge filing a viogorous and well supported opinion.

We respectfully suggest, therefore, that this case presents an issue of such magnitude and importance that it warrants the consideration of all the members of this Court, sitting in Banc.

On the grounds and for the reasons stated, Clayton Brokerage Co. of St. Louis, Inc. respectfully asks for a rehearing of this case by this Court, sitting in Banc.

Respectfully submitted,

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APPENDIX D

Petition of Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc. for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 79-7402, 79-7464 and 79-7482 (CONSOLIDATED)

No. 79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, et al.,

Defendants,

and

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

No. 79-7464

INCOMCO,

Plaintiff-Appellant,

—against—

WAYNE COUNTY PRODUCE CO. and HAROLD COLLINS,

Defendants,

and

NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

Appendix D

No. 79-7482

NATIONAL SUPER SPUDS, INC., et al.,
Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.,
Defendants,

and

HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

Appellee Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc. (hereinafter Thomson) respectfully petitions this Court for rehearing of the appeal decided herein on July 8, 1980 and also respectfully suggests the appropriateness of rehearing *in banc*.[1]

The decision of the panel rendered on July 8, 1980 addresses an extremely important issue—whether or not a private right of action may be implied on behalf of speculators in commodities under §§ 4b and 9(b) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 6b and 13(b), against brokers such as Thomson who are members of the New York Mercantile Exchange and registered with the Commodity Futures Trading Commission.[2]

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[1] Pursuant to Fed. R. App. P. 40 and 35 and 28 U.S.C. § 46(c).

[2] The decision also considers private rights of action against the contract market and its officials under §§ 5(d), 5a(8) and 9(b) of the Act, 7 U.S.C. §§ 7(d), 7a(8) and 13(b).

Each of the other brokers involved in this case, Heinold Commodities, Inc. and Clayton Brokerage Co. have already petitioned this Court for a rehearing. Also, the contract market and its officials, Appellees New York Mercantile Exchange, Richard B. Levine, Howard Gabler and Alfred Pennisi have petitioned for rehearing with a suggestion for a rehearing *in banc*. Thomson believes these petitions set forth all of the arguments in support of the petition for rehearing with a suggestion for a rehearing *in banc*.[3]

Conclusion

Wherefore, it is respectfully urged that this Petition for Rehearing and Suggestion for Rehearing *in banc* be granted, and that upon such rehearing, the Judgment below be affirmed in accordance with the dissenting opinion of Circuit Judge Mansfield.

Respectfully submitted,

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[3] Pursuant to Fed. R. App. P. 28(i), Thomson adopts each of these arguments by reference.

CORRECTED COPY

No. 80-203

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER,

vs.

J. J. CURRAN AND JACQUELYN L. CURRAN,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF PETITIONER, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

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QUESTION PRESENTED FOR REVIEW

I.

Does the Commodity Exchange Act implicitly create a private right of action for fraud in favor of a customer against his broker?

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OPINIONS BELOW

The Opinion of the District Court (A39-A49)[1] is not officially reported. The Opinion of the Court of Appeals (A1-A38) is reported at 622 F.2d 216 (6th Cir. 1980).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Judgment of the Court of Appeals was entered on May 12, 1980. Petitioner timely filed its petition for a writ of certiorari, which this Court granted on April 22, 1981.

STATUTES INVOLVED

Section 4b of the Commodity Exchange Act ("CEA"), 88 Stat. 1413, 7 U.S.C. §6b (1974) and other pertinent sections of the Act are appended to the petition for a writ of certiorari. (A52-A57)

STATEMENT OF THE CASE

In 1973, Respondents J.J. Curran and Jacquelyn L. Curran (the "Currans") opened several commodity trading accounts with petitioner, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), a futures commission merchant ("FCM") registered as such with the Commodity Futures Trading Commission ("CFTC") pursuant to section 4f of the CEA, 7 U.S.C. §6f. Merrill Lynch, as an FCM, acts as a broker for persons desiring to trade commodity futures contracts, buying and selling futures contracts for the accounts of its customers on

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[1] "A__" page references are to the Appendix to the petition for a writ of certiorari. "B__" page references are to the Appendix to this brief containing Code of Federal Regulations sections. "JA__" page references are to the Joint Appendix submitted with this brief under separate cover.

the various contract markets of which it is a member. Upon opening the accounts, the Currans signed agreements to submit to arbitration disputes that might arise with Merrill Lynch.

The commodity trading in the Currans' accounts resulted in losses and the accounts were closed in April, 1974. In April, 1976, the Currans brought suit for damages in the United States District Court for the Eastern District of Michigan. The Currans alleged violations of sections 5 (failure to register), 12(2) (misleading statements) and 17(a) (fraud) of the Securities Act of 1933, 15 U.S.C. §§77e, 771(2), 77q(a); section 15(c)(1) (fraud and rulemaking powers) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(c)(1), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5. The Currans also alleged violation of section 4b (fraud) of the CEA, 7 U.S.C. §6b,[2] as well as breaches of duties owed under the Michigan Uniform Securities Act, rules and regulations of the National Association of Securities Dealers, the New York Stock Exchange and the Chicago Mercantile Exchange, and common law principles of fraud, negligence and contract. Jurisdiction was alleged pursuant to section 22(a) of the 1933 Act, 15 U.S.C. §77v(a); section 27 of the 1934 Act, 15 U.S.C. §78aa; §§1331, 1332 and 1337 of Title 28 of the United States Code; and by virtue of pendent jurisdiction.

Upon Merrill Lynch's motion, the District Court dismissed the Currans' claims under the 1933 and 1934 Acts and directed the remaining claims to arbitration in accordance with the parties' agreement. In so ruling, the District Court held that the Currans' commodity trading accounts did not

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[2] The Complaint (JA6-21) alleges activities (fraud) such as are made unlawful by section 4b of the CEA, 7 U.S.C. §6b. The Complaint actually specifies violation of "Section 6 of the Commodity Exchange Act." Petitioner assumes, however, as did the Court of Appeals (A37) that Respondent seeks recovery under CEA section 4b, 7 U.S.C. §6b.

constitute "securities" within the meaning of the 1933 and 1934 Acts and that, upon dismissal of the federal securities claims, there was no impediment to enforcement of the arbitration agreement in accordance with the Federal Arbitration Act, 9 U.S.C. §3.[3]

The Currans appealed from the District Court's ruling that no cause of action had been stated under the federal securities laws and also argued that the District Court had erred in submitting the dispute to arbitration because the arbitration agreement did not conform to requirements set forth in CFTC Reg. §180.3, 17 C.F.R. §180.3. That regulation (A58), effective November 29, 1976, provides that, to be enforceable, arbitration clauses must, *inter alia*, be signed separately and apprise the customer, in bold-face type, that he may be waiving a right to sue in court. The arbitration agreements signed by the Currans in 1973 do not meet these requirements.

The Court of Appeals unanimously affirmed the District Court's ruling that the Currans' federal securities claims should be dismissed for the reason that no security was involved. The Court also adopted the Currans' argument that CFTC Reg. §180.3 should be applied retroactively to invalidate the arbitration agreement between the parties.

The Court of Appeals then raised, *sua sponte*, the issue of whether a private cause of action exists under the anti-fraud provisions of the CEA. Without benefit of briefing or argument by the parties, a majority of the panel concluded that the CEA provides an *implied* private right of action for fraud. The Court accordingly reversed the District Court's order staying the CEA claims pending arbitration, remanding those

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[3] Merrill Lynch conceded that *Wilko v. Swan*, 346 U.S. 427 (1953), precluded enforcement of the arbitration agreement so long as the federal securities claims remained at issue.

claims for trial on the merits. Judge Phillips dissented, reasoning that Congress' creation of an administrative reparations procedure under the CEA and its concomitant failure expressly to provide a private judicial remedy precludes the inference of such a right.

Merrill Lynch sought review in this Court of the Court of Appeals' decision to infer a private judicial remedy under the CEA and its decision retroactively to apply the requirements of CFTC Reg. §180.3. This Court granted certiorari as to the first question only.

SUMMARY OF ARGUMENT

The sole question presented is whether the CEA provides, to a trader of commodity futures contracts, a right to bring an action against an FCM in the United States District Court to recover damages for violations of section 4b of the CEA. The CEA does not expressly confer this substantive right. Accordingly, the question to be considered by this Court is whether Congress intended to create, and enacted by implication, a private right of action.

The inquiry may begin and conclude with examination of the language and structure of the statute itself. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). The CEA, by its express terms, grants exclusive regulatory control over commodity futures trading to the CFTC. The regulatory purview of the Act is comprehensive, covering all aspects of commodity futures trading and all of the various classes of participants in the futures markets. Detailed licensing and organizational requirements, standards of conduct, proscribed activities and a broad panoply of enforcement measures and remedial proceedings are expressly provided for in the Act. The express enactment of such

pervasive enforcement and remedial measures is inconsistent with the existence of any additional implied substantive right for private enforcement. The express terms and structure of the statute itself therefore dispose of the question of the existence of an implied private right of action and compel a negative conclusion.

Other indicia of legislative intent suggested in *Cort v. Ash*, 422 U.S. 66 (1975), and refined in *Transamerica* and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), compel the same conclusion. The CEA makes it clear that speculators such as the Currans are not a class of persons for whose *especial* benefit the anti-fraud provisions of the CEA were enacted. The CEA does not focus its protection on any particular group. Second, there is no indication of explicit or implicit legislative intent to grant the private right of action alleged by the Currans. The comprehensive enforcement scheme expressly provided in the CEA creates a presumption against the existence of an additional implicit remedy and there is no clear evidence in the legislative history or elsewhere of any contrary legislative intent. Third, it would be inconsistent with the underlying purpose of the legislative scheme to infer such a private right of action. The legislative scheme carefully balances the interests of all sectors of the commodity futures markets by providing for the duties, obligations and standards of conduct set forth in the Act together with the expressly provided remedies. Creation of a private judicial damage remedy would alter that balance, contrary to the intent of Congress. The fourth inquiry suggested by *Cort* also weighs against inference of a cause of action in the federal courts. Notwithstanding that commodity regulation is a matter of federal concern not traditionally relegated to state law, the statute expressly provides for coherent, expert agency regulation and an administrative remedy. The uniform, integrated and preemptive regulation that Congress sought

would be frustrated by judicial creation of a right to proceed in the first instance with private claims in the federal courts.

The analysis incorporating the foregoing considerations has been developed in the previous decisions of this Court to permit principled adjudication of the question of implied private rights of action and to prevent judicial arrogation of the legislative function that article I of the United States Constitution places solely in the Congress. Application of that analysis and adherence to the underlying constitutional principle compels the conclusion that there is no private right of action under section 4b of the CEA.

I.

A Judicially Created Private Right of Action is Inconsistent with the Express Provisions of the CEA and the Regulatory Scheme it Establishes.

A. The Reason for Regulation

The importance to the national economy of the commodity futures markets regulated by the CEA cannot be overstated. Availing themselves of the hedging function provided by futures markets, farmers and other producers of commodities are able to protect themselves against declines in the cash prices of their commodities by assuming short positions in futures contracts for those same commodities. Similarly, processors and other commercial users of commodities can protect themselves against upward movement of commodity prices by assuming long positions in futures contracts for the commodities they will later acquire. Having thus abated the risk of adverse market price movement, processors are able both to pay higher prices to farmers and other producers, and to pass along processed goods to the ultimate consumer without the added cost that vulnerability to the unabated risk

would impose. Having similarly hedged against the risk of downward market price movement, farmers are better able to plan and finance future operations. Indeed, many lenders require hedging in the commodity futures market as a condition of loans to agricultural enterprises.[4]

The risk shifting mechanism provided by commodity futures markets has a pervasive effect on the national economy. The commodities in which futures contracts are traded, subject to CEA regulation, are the very staples of agriculture, finance and industry.[5] An orderly futures market is therefore of paramount importance not only to producers and commercial users of commodities, and to the exchanges, brokers and speculators involved in the market itself, but also

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[4] *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 539 (1974) (statement of Frederick G. Uhlmann); *Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Comm. On Agriculture*, 93d Cong., 2d Sess. 130-31 (1974) (statement of C. L. William Haw).

[5] The following commodities are traded on the designated contract markets listed below:

Chicago Board of Trade

commercial paper	silver	corn
soybean meal	GNMA certificates	soybean oil
gold	soybeans	plywood
stud lumber	oats	
U.S. Treasury bonds	wheat	

Chicago Mercantile Exchange

butter	Idaho potatoes	cattle
live hogs	eggs	lumber
frozen boneless beef	skinned hams	frozen pork bellies
turkeys	grain sorghums	iced broilers

Citrus Associates of the New York Cotton Exchange

orange juice

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to the general population which benefits by the stabilized availability and price of goods that an orderly futures market promotes.

A 1980 report indicates the regulated industry includes 329 brokerage firms, 555 money managers, 914 trading advisors

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Commodity Exchange

copper	British pounds	gold
Canadian dollars	silver	

International Monetary Market of the Chicago Mercantile Exchange

British pounds	gold	Canadian dollars
Japanese yen	copper	Mexican pesos
Deutschmarks	Swiss francs	Dutch guilders
U.S. silver coins	French francs	U.S. Treasury bills

Kansas City Board of Trade

corn	soybeans	grain sorghums
wheat		

MidAmerica Commodity Exchange

cattle	silver	corn
soybeans	gold	U.S. silver coins
hogs	wheat	oats

Minneapolis Grain Exchange

barley	oats	corn
rye	flaxseed	soybeans
frozen pork bellies	wheat	

New Orleans Commodity Exchange

rice

Coffee, Sugar and Cocoa Exchange of New York

coffee	sugar	cocoa

New York Cotton Exchange

cotton

New York Futures Exchange

Swiss francs	Deutschmarks	British pounds
Yen	Canadian dollars	Treasury bills

20-Year Treasury bonds

Ninety-day Certificates of Deposit (starting July 9, 1981)

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and over 31,000 salesmen,[6] with futures trading now occurring on some fourteen exchanges.[7] In the last decade the volume of commodity futures contracts traded has expanded sevenfold and what was previously a business primarily of interest to floor traders and commercial hedgers now involves hundreds of thousands of individual investors.

B. The Statute

Although the federal government has been involved in commodities regulation since passage of the Grain Futures Act of 1922, and expanded its regulatory powers by passage of the CEA in 1936 and by amendment in 1968, it was not until 1974 that Congress, in response to a virtual explosion in futures trading activity[8] and to a perceived inadequacy of existing regulation, sought to bring the entire commodity

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New York Mercantile Exchange

Belgian francs	industrial fuel oil	British pounds
Italian lira	butter	Japanese yen
Canadian dollars	Maine potatoes	Deutschmarks
Mexican pesos	Dutch guilders	palladium
frozen boneless beef	platinum	gold
Swiss francs	heating oil	U.S. silver coins

Petroleum Associates of the New York Cotton Exchange

crude oil	liquified propane

Wool Associates of the New York Cotton Exchange

wool

[6] Remarks of Philip F. Johnson, Chairman, ABA Committee on Commodities Regulation, 35 Bus. Law. 691 (special issue) (March 1980).

[7] *See* note 5, *supra*.

[8] Total trading volume in commodity futures contracts rose from approximately 9.5 million contracts in 1967 to 32.2 million contracts in 1975. S. Rep. No. 95-850, 95th Cong., 2d Sess. 13, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087, 2101.

futures market and all related activities under one broad regulatory umbrella.

Prior to 1974, regulation of the field was diffuse and erratic, combining elements of industry self-regulation; limited regulation by the old Commodity Exchange Commission; regulation by other federal agencies, such as the SEC; and regulation under innumerable state laws (e.g., state securities laws, state consumer protection laws). As one commentator described the situation:

> "The potential for a hodge-podge of regulatory requirements, acting in counter-working or conflicting fashion to one another, clearly was present — unless of course Congress centralized regulatory power in a single federal agency."[9]

By enactment of the Commodity Futures Trading Commission Act of 1974 ("1974 Amendments") Congress effected a sweeping revision and quantum expansion of the scope of the Act. The 1974 Amendments have as their cornerstone the creation of the CFTC, a new and expert agency vested with "*exclusive* jurisdiction"[10] over the regulation of commodity futures trading and related activities. The 1974 Amendments provide for comprehensive oversight of the industry by an expert agency vested with sure and diverse enforcement powers.

Mindful of the magnitude and the complexity of the economic activities to be regulated and the diversity of the often conflicting interests of the various sectors of the economy involved, Congress enacted a full and comprehensive regulatory program to regulate the commodity futures markets and all related activities:

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[9] Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 1, 5 (1976).

[10] Section 2(a)(1), 7 U.S.C. §2 (emphasis added).

> "The Commodity Futures Trading Commission was created in order to assure that a single expert agency would have the responsibility for developing a coherent regulatory program encompassing futures trading and related activities. Therefore, Congress has vested in the Commission exclusive jurisdiction to build upon the foundation provided by the Commodity Exchange Act in erecting a sound and strong Federal regulatory policy governing futures trading."[11]

The comprehensive scope of the CEA following its amendment in 1974 manifests the expressed congressional intent to bring all aspects of the commodity futures market under the supervision of one agency, the CFTC;[12] to insure that the Commission is equipped with the expertise necessary to develop and provide effective regulation,[13] and with statutory and rulemaking powers to implement that regulation;[14] and to provide the Commission with a broad range of penal and remedial powers[15] to enforce compliance.

The intent of Congress to vest uniform, coherent control in an expert regulatory body with exclusive jurisdiction over

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[11] S. Rep. No. 95-850, 95th Cong., 2nd Sess. 13, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087, 2101.

[12] Section 2(a)(1), 7 U.S.C. §2.

[13] Section 2(a)(2) 7 U.S.C. §4a(a)(1) provides:

> "[T]he President shall seek to establish and maintain a balanced Commission, including, but not limited to, persons of demonstrated knowledge in futures trading or its regulation and persons of demonstrated knowledge in the production, merchandising, processing or distribution of one or more of the commodities or other goods and articles, services, rights and interests covered by this chapter."

[14] Section 2(a)(11), 7 U.S.C. §4a(j); Section 8a(5), 7 U.S.C. §12a(5).

[15] *See* notes 17-25, *infra*, and accompanying text.

futures trading is embodied in and fully effectuated by the express language and structure of the CEA. Especially noteworthy in the context of this case are the enforcement and remedial powers provided for in the Act.

With respect to FCMs such as petitioner Merrill Lynch, the Commission has authority to suspend trading privileges[16] and to revoke or suspend the FCM's registration for violation of any provision of the Act or rules, regulations or orders of the CFTC, and is empowered to assess a civil penalty of up to $100,000 for each violation.[17] The Commission is empowered to deny FCM registration to persons deemed unfit for reasons set forth in the statute[18] and to compel contract markets to refuse trading privileges to FCMs that are the subject of disciplinary action.[19] Other specified acts of misconduct are made felonies under the Act, punishable by a fine of up to $500,000 ($100,000 if the violator is an individual) and imprisonment of up to five years, or both.[20] One act so punishable is knowing violation of the section at issue here, section 4b.[21] The Commission is also empowered to proceed in the United States district courts to enjoin existing or threatened violation of any section of the CEA, or rules, regulations or orders of the Commission,[22] and the district

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[16] Section 6(b), 7 U.S.C. §9. *See also* section 8b, 7 U.S.C. §12b (making it unlawful for any person to trade in futures in contravention of an outstanding Commission order prohibiting him from trading).

[17] Section 6(b), 7 U.S.C. §9.

[18] Section 8a(2), 7 U.S.C. §12a(2).

[19] Section 6(b), 7 U.S.C. §9.

[20] Section 9, 7 U.S.C. §13.

[21] *Id.*

[22] Section 6c, 7 U.S.C. §13a-1.

courts are expressly granted jurisdiction over such suits. Additionally, state attorneys general are given authority to bring similar actions for injunctive relief and the recovery of damages on behalf of residents of their respective states,[23] and jurisdiction over such suits is again expressly conferred upon the United States district courts. In furtherance of its enforcement function, the Commission is granted subpoena powers over persons and documents and, again, the district courts are expressly granted jurisdiction to enforce those powers.[24]

Of particular importance to the instant case is the provision in section 14 of the CEA, 7 U.S.C. §18, for reparation proceedings on behalf of any person claiming a violation, on the part of any person required to be registered under the Act, of any provision of the CEA, or rule, regulation or order promulgated thereunder. This section provides to individuals such as the Currans a full and complete remedy for losses sustained as a result of wrongdoing such as they allege, but it is a remedy statutorily provided within the framework of the uniform, cohesive and expert CFTC administration of commodity futures trading that is the cornerstone of the 1974 Amendments.

Reparation proceedings are structured by statute and by regulation[25] to provide claimants with every opportunity fully and fairly to present their claims as in a court of law. Opportunity is granted for a hearing before an Adminstrative Law Judge and the regulations provide for subpoena powers and for discovery and other adjudicatory procedures comparable to those available in the courts.[26] Following hearing before the

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[23] Section 6d, 7 U.S.C. §13a-2.

[24] Section 6(b), 7 U.S.C. §15.

[25] 17 C.F.R. §§12.1-12.102 (B1-29).

[26] The following sets forth the substance of many of the CFTC reparation rules, and includes citations to those rules and to comparable provisions of the applicable Federal Rules:

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Administrative Law Judge, the Commission must make a determination whether the respondent has violated any provision of the CEA, or any rule, regulation or order promulgated thereunder. If the Commission finds that a violation has occurred it *shall* determine the amount of damages to which the person is entitled and make an order directing the offender to

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A complaint shall briefly state the facts in a manner permitting each fact to be admitted or denied (17 C.F.R. §12.21(a), Fed. R. Civ. P. 10(b)); the complaint shall be signed under oath by the complainant or his authorized agent (17 C.F.R. §12.21(b), Fed. R. Civ. P. 11); the answer shall specifically state the facts and grounds for each defense (17 C.F.R. §12.23(b)(1), Fed. R. Civ. P. 8(b) and (c)); the answer shall specifically admit, deny or explain each of the allegations of the complaint (17 C.F.R. §12.23(b)(1), Fed. R. Civ. P. 8(b)); the respondent may file a counterclaim arising out of the same transaction or occurrence (17 C.F.R. §12.23(b)(2), Fed. R. Civ. P. 13(a)); failure to answer may result in a default without a hearing (17 C.F.R. §12.26(a), Fed. R. Civ. P. 55(a)); pleadings shall be amended to conform to the evidence (17 C.F.R. §12.45(d), Fed. R. Civ. P. 15(b)); motions can be made for any form of relief not otherwise specifically provided for in the rules (17 C.F.R. §§12.43(h), 12.46, Fed. R. Civ. P. 7(b)); interlocutory review may be obtained of rulings on controlling questions of law or policy where immediate appeal will advance ultimate resolution of the issue (17 C.F.R. §12.47(a), 28 U.S.C. §1292(b), Fed. R. App. P. 5); all pleadings, motions, etc., shall be served upon other parties by mail or in person (17 C.F.R. §12.48(b), Fed. R. Civ. P. 5(b)); any party may serve on any other party notice to produce copies of relevant documents (17 C.F.R. §12.63, Fed. R. Civ. P. 34(a)); depositions on written interrogatories may be taken of other parties without order or subpoena, and of non-parties pursuant to order or subpoena (17 C.F.R. §12.64, Fed. R. Civ. P. 31, 33); requests for admissions may be served on any party (17 C.F.R. §12.65, Fed. R. Civ. P. 36(a)); summary disposition is permissible upon motion, answer, and oral argument where there is "no genuine issue of material fact" (17 C.F.R. §12.67, Fed. R. Civ. P. 56); any party may apply to the Administrative Law Judge for a *subpoena ad testificandum* or *duces tecum* (17 C.F.R. §12.74, Fed. R. Civ. P. 45); objections must be timely made and the grounds therefor must be stated (17 C.F.R. §12.80(c), Fed. R. Evid. 103(a)(1); Administrative Law Judges have the power to award costs as well as damages (17 C.F.R. §12.84(c), Fed. R. Civ. P. 54(d)).

pay that amount to the complaining person.[27] Reparation orders of the Commission are expressly, by statute, made enforceable in the United States District Court in the district in which the respondent resides or conducts business and petitioners are entitled, by statute, to recover a reasonable attorney fee in the District Court, to be taxed and collected as part of the cost of the suit.[28] Orders of the Commission are expressly made reviewable on petition of any aggrieved party in the United States Courts of Appeals.[29] Registrants ordered by the Commission to make reparation who fail to do so are automatically prohibited from trading on all contract markets and subjected to suspension of registration.[30]

Section 14 reparation proceedings manifest the dual concerns of Congress to provide a sure and firm damage remedy to persons aggrieved by violations of the CEA and to do so in a manner consistent with the fundamental statutory purpose to bring commodity futures trading and related activities within the exclusive jurisdiction of a single expert agency. Judicial fashioning of an additional private right of action, in the federal courts, for violations of the CEA would be inconsistent with and in derogation of the balance and coherence achieved by Congress in the CEA.

Under section 14(e), Congress has given the Commission responsibility to determine if violations have occurred and "the amount of damage, if any, to which [a complainant] is entitled as a result of [a] violation". The CEA, at section 2(a)(2), 7 U.S.C. §4a(a)(1), requires that members of the Commission possess a degree of expertise in the commodity

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[27] Section 14(e), 7 U.S.C. §18(e).

[28] Section 14(f), 7 U.S.C. §18(f).

[29] Section 14(g), 7 U.S.C. §18(g).

[30] Section 14(h), 7 U.S.C. §18(h).

futures market and has vested the Commission with responsibility to consider the diverse interests of various sectors of that market in carrying out their regulatory function. The expertise of the Commission, its perspective of the overall market and its responsiblity for consideration of the complex interrelationships of the various sectors thereof give the Commission a unique capability for determining if the CEA has been violated and, if so, what damages are to be awarded in reparation proceedings.

Concomitant enactment of the exclusive jurisdiction provision of the CEA, section 2(a)(1), and of section 14 was responsive to concerns such as those expressed in the following testimony:

> "[I]t is extremely important that federal policy regarding commodities futures trading be uniform throughout the United States, *and not be subject to the vagaries of different interpretations by different courts in different jurisdictions*, especially in view of the technical and sophisticated nature of the subject being regulated and the high degree of foreign involvement. (Emphasis added.)[31]

Thus, the CFTC was "created in order to assure that a single expert agency would have the responsiblity for developing a coherent regulatory program . . ."[32] Adherence to the statutory scheme will promote the administrative coherence sought by Congress: It will permit consistent action, by the Commission, in determining whether violations have occurred

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[31] *Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 121 (1973) (Statement of Reed Clark expressing concern regarding lawsuits against exchanges).

[32] S. Rep. No. 95-850, 95th Cong., 2d Sess. 13, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087, 2101.

and, if so, the appropriate amount of damages to be recovered. To depart from the statutory scheme and provide a private judicial remedy would allow litigation to proceed in the district courts of all jurisdictions, thus frustating the expressed congressional intent to keep determination of violations and of damage awards under section 14 within the exclusive jurisdiction of a single expert agency.

C. Constitutionally Required Principles of Statutory Construction Applied to the Language and Structure of the CEA Compel the Conclusion that No Private Right of Action Exists.

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) gave effect to constitutional limitations on the power of the federal judiciary to create by "inference," under federal regulatory statutes, remedies not enacted by Congress. The constitutional significance of *Transamerica* is best seen in the historical context of the judicial activism it lays to rest.

In 1912 A.R. Rigsby, a switchman employed by the Texas and Pacific Railway Company, fell from a boxcar on which he was working and sustained personal injuries. His fall resulted from a defective ladder which violated the Federal Safety Appliance Act, 27 Stat. 531, a statute requiring "secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars". None of the Federal Safety Appliance Acts expressly conferred a right of action for the death or injury of an employee. Nonetheless, this Court in *Texas & P.R. Co. v. Rigsby*, 241 U.S. 33 (1916), affirmed Rigsby's recovery of damages against his employer. The Court held that:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, *the right to recover the damages from the party in default is implied, according to a doctrine of the common law*. . .[emphasis added, citation omitted]. . .'So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law' [citation omitted]. This is but an application of the maxim, *ubi jus ibi remedium*."[33]

241 U.S. at 39-40.

The *Rigsby* Court, honoring a tort per se theory, unabashedly engaged in lawmaking as it generated a substantive rule of decision: a statutory duty evidences a duty owed to the plaintiff and the breach thereof is actionable.[34] Such judicial lawmaking was hardly shocking in the era in which *Rigsby* was decided, when the rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) authorized the federal courts to fashion a federal

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[33] Where there is a right, there is a remedy.

[34] It should be noted that the *Rigsby* Court might have reached the same result, finding an implied private right of action, even under the more rigorous principles of statutory construction that the Court emphasized in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). The statute in *Rigsby* provided that an employee injured by a car in use contrary to the act "shall not be deemed to have assumed the risk." Express removal by the statute of a legal defense to an employee's suit might well render permissible an inference that Congress intended that employees have the right to bring such suits. In *Transamerica* a statutory provision rendering certain contracts void created the inference that Congress intended a right of action to adjudicate the issue of voidness. The constitutional mischief of *Rigsby*, however, is its oft-cited reliance on the common law tort per se theory for implication of a private right of action under a regulatory statute that does not expressly provide such a right.

general common law in diversity cases. Application of time honored common law principles such as *ubi jus ibi remedium* might be expected to carry over into federal question cases, as it did in *Rigsby*, in furtherance of the development of the federal general common law.

In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), however, the Court overruled *Swift v. Tyson*, holding that "[t]here is no federal general common law". 304 U.S. at 78. Moreover, article I, section 1 of the United States Constitution compels application of *Erie's* proscription of judicial lawmaking to federal question as well as to diversity cases. Judicial adherence to the constitutional proscription against substantive judicial lawmaking has, however, been inconsistent in federal question cases even in the years since *Erie* expressly laid to rest the concept of a federal general common law.

For example, in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the Court applied general common law principles reminiscent of the tort per se rule of *Rigsby* in creating a private right of action under section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a). Having emphasized section 14(a)'s remedial purpose the Court stated as follows:

> "Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possiblity of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements . . .
>
> "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose."

377 U.S. at 432-33.

Borak **perhaps represents the high water mark of judicial activism in the creation of substantive rights of action from regulatory statutes. It is analytically suspect on several grounds. First, the determination of whether private enforcement of section 14(a) is "necessary" as a "supplement to Commission action" is a legislative function that the Constitution places squarely in the Congress. The analogy to the antitrust laws is therefore inappropriate insofar as the right of a private litigant to pursue civil damages under the antitrust laws is a substantive right expressly enacted by Congress[35] and not "provided" by the federal judiciary. Finally, *Borak* confuses the traditional implicit judicial power to fashion remedies to effectuate a substantive right of action enacted by Congress, with unconstitutional judicial usurpation of the congressional prerogative to create the substantive right itself.[36] *Borak* represents, quite plainly, an open invitation to the Judicial Branch to substitute its own judgment for that of Congress as to how the general purpose of a statute might best be effectuated.**

The judicial enthusiam, apparent in *Borak*, for creation of private rights of action under federal regulatory legislation appears to have guided the majority below notwithstanding this Court's most recent decisions that flatly reject the tort per se theory manifest in *Rigsby* and *Borak*. The majority below held as follows:

> "What we have done here, in our view, is to preserve the general concept of a private right of action and

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[35] 15 U.S.C. §15.

[36] *See generally* Maher, *Implied Private Rights of Action and the Federal Securities Laws: A Historical Perspective*, 37 Wash. & Lee L. Rev. 783 (1980).

> to provide for its continuing development, not under the securities laws generally, but under those laws of Congress which are more particularly related to the commodities market. This approach provides greater sensitivity to the specialized concerns of that area of commercial life, appears consistent with Congressional intent and also allows for the development of a private right of action similar to the valuable body of law that has grown under Section 10 of the Securities Exchange Act and Rule 10b-5." (A36)

Under article I, section 1 of the Constitution, the right to "*preserve* . . . a private right of action and to *provide* for its continuing development" is that of Congress alone. The constitutional truth of this principle, and the error of the majority below, are plain in the light of this Court's recent decisions articulating the factors that justify, only under circumstances not present here, judicial inference of a private right of action that has been, in the first instance, implicitly created by the Congress.

In *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), the Court considered the question of whether there is a private right of action under section 206 of the Investment Advisers Act of 1940.[37] Section 206, as does CEA section 4b, broadly proscribes fraudulent practices: It is fair to say that section 206 is the counterpart in its statutory scheme to section 4b of the CEA. In reaching the conclusion that no private right of action is implied under section 206, the Court applied the canon of statutory construction previously re-emphasized in *Touche Ross & Co. v. Redington*,

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[37] 15 U.S.C. §80b-6.

442 U.S. 560, 568 (1979): "As with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself". The Court relied heavily upon the express language and structure of the Investment Advisers Act, similar in many key respects to the language and structure of the CEA, in concluding that the statute does not implicitly confer a private right of action:

> "[Section] 206 simply proscribes certain conduct, and does not in terms create or alter any civil liabilities. If monetary liability to a private plaintiff is to be found it must be read into the Act. *Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it*. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' [citations omitted] Congress expressly provided both judicial and administrative means for enforcing compliance with §206. First, under §217, 15 U.S.C. §80b-17, willful violations of the Act are criminal offenses, punishable by fine or imprisonment, or both. Second, §209 authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, §206. Third, the Commission is authorized by §203 to impose various administrative sanctions on persons who violate the Act, including §206. *In view of these express provisions for enforcing the duties imposed by §206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action'.*"

444 U.S. at 19-20 [emphasis added].

The language and structure of the CEA make it clear that the same considerations that precluded judicial inference of a

private right of action under section 206 of the Investment Advisers Act in *Transamerica* compel the same result in this case. As in *Transamerica*, the statute at issue here provides for broad and varied means of judicial and administrative enforcement of its proscriptive provisions: "A court must be chary of reading others into it."

The reparation procedure provided by section 14 of the CEA renders this case even more compelling than *Transamerica* for denial of an additional private judicial remedy. In construing the CEA there is no reason for a court to speculate whether Congress intended that persons aggrieved by violations of the Act be entitled to recover damages. Plainly, Congress did so intend and expressly provided a forum and a detailed procedure by which the remedy may be pursued. Morever, the express provisions of section 14 make it clear that Congress considered the role to be played by the federal courts in the recovery of damages and expressly limited that role to enforcement and review of administrative reparation awards. By so providing, Congress implicitly rejected and foreclosed the right here asserted by the Currans to proceed with private damage claims in the federal courts in the first instance:[38] "Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Transamerica*, *supra*, at 21; *Touche Ross*, *supra*, at 572.

The majority below erred in its disregard of the fundamental canons of statutory construction emphasized in *Transamerica*. It reverted, in essence, to the discredited tort per se analysis of *Rigsby* and *Borak*. The majority, stressing the remedial purposes of the CEA and perceiving a congressional

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[38] *Compare* Sections 308, 309, Packers and Stockyards Act, 7 U.S.C. §§209, 210 (providing agency reparations proceedings analogous to CEA Section 14, while *expressly* providing an alternative judicial right of action).

intent to protect investors, concluded that a private judicial right of action would advance the congressional purpose and proceeded to fashion that substantive right. *Touche Ross*, however, expressly rejects such analysis:

> "The question of the existence of a statutory cause of action is, of course, one of statutory construction . . . [*The*] *argument in favor of implication of a private right of action based on tort principles, therefore, is entirely misplaced* . . . As we recently have emphasized, 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person' . . . Instead, our task is limited solely to determining whether Congress intended to create the private right of action asserted . . . And as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." [Citations omitted.]

422 U.S. at 568.

Merrill Lynch submits that the express language and the structure of the CEA are conclusive evidence that Congress intended that no private judicial right of action exist under the CEA. All of the canons of statutory construction emphasized in *Transamerica* and *Touche Ross* and recently reiterated in *Middlesex County Sewage Auth. v. National Sea Clammers Assn.*, ____U.S.____, 49 U.S.L.W. 4783 (June 25, 1981), *Northwest Airlines, Inc. v. Transport Workers Union*, 49 U.S.L.W. 4383 (April 20, 1981) and *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), when applied to the CEA, refute the existence of a private right of action. Only in cases where the intent of Congress to grant or to deny a private right of action is ambiguous because

of the language and structure of a statute[39] does the need arise to pursue other sources of potential illumination of congressional intent, such as legislative history or the circumstances surrounding enactment of the legislation. In cases such as the one at bar, where the congressional intent not to confer a private judicial right of action is manifest within the language and structure of the CEA itself, the Court's inquiry is at an end.[40]

II.

Application of the *Cort v. Ash* Analysis Compels the Conclusion that There is No Private Right of Action Under Section 4b of the CEA.

In *Cort v. Ash*, 422 U.S. 66 (1975) the Court listed four factors thought to be relevant to a determination whether a private right of action should be inferred from a federal statute.[41] Cases subsequent to *Cort* have explained that the

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[39] *See, e.g., Transamerica* (ambiguity created by one provision [section 215, 15 U.S.C. §80b-15] declaring certain contracts void, within a statute not expressly providing a right to adjudicate the issue of voidness).

[40] In *Kissinger, supra*, the Court concluded that no private right of action existed under the statutes in question purely by reference to the language and structure of the statutes. The discussion of legislative history by the Court simply "confirms" the Court's conclusion that the statutes' silence as to private rights of action is purposeful. 445 U.S. at 149.

[41] "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78 (citations omitted).

ultimate issue is whether Congress intended to create a private right of action[42] but the four factors specified in *Cort* retain significance as the criteria through which this intent can be discerned.[43]

As noted in the foregoing sections of this brief, Merrill Lynch contends that the express language and structure of the CEA are conclusive as to the congressional intent that no private right of action exists under section 4b. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

As also noted in *Transamerica, supra*, at 20, even settled rules of statutory construction could yield to "*persuasive evidence* of a contrary legislative intent" [emphasis added]. The evidence of intent that is developed in this case by pursuit of the four *Cort* inquiries, however, weighs against the implication of a private right of action and simply confirms the conclusion mandated by the language and structure of the CEA.

A. Section 4b Was Not Enacted for the Especial Benefit of Any Class.

The expressed purpose of the CEA is to maintain an orderly futures market in aid of a stable, unobstructed flow of interstate commerce in commodities. Section 3 of the CEA, 7 U.S.C. §5 states Congress' purpose as follows:

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[42] *See California v. Sierra Club*, ___ U.S. ___, 49 U.S.L.W. 4441 (April 28, 1981); *Universities Research Assn. v. Coutu*, ___ U.S. ___, 49 U.S.L.W. 4354 (April 6, 1981); *Transamerica Mortgage Advisors v. Lewis, supra*, at 23-24; *Touche Ross & Co. v. Redington, supra*, at 568, 575-76.

[43] *Davis v. Passman*, 442 U.S. 228, 241 (1979); *Transamerica Mortgage Advisors v. Lewis, supra*, at 27 (White, J., dissenting).

"Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest; such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodity and the products and byproducts thereof in interstate commerce; the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodity and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodity and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interestsate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

It is plain that the CEA does not focus its protection on any discrete group: it was not enacted for the "*especial* benefit" of

any "class" of persons. Section 3 makes reference to several groups centrally involved in commerce in commodities. It speaks of shippers, dealers, millers and others engaged in handling commodities. It speaks of the involvement of the "public generally" in futures transactions. It refers to the harm caused consumers and producers by abusive speculation and manipulation. It characterizes the sudden or unreasonable price fluctuations generated by those abuses in the market as "an obstruction to and a burden upon interstate commerce". It deems regulation to be "imperative for the protection of . . . commerce and the national public interest".

Similarly broad are the anti-fraud provisions of section 4b which proscribe, in essence, cheating or defrauding by "any person," of any "other person" in connection with commodity futures transactions. There is no effort by Congress to focus the benefit of outlawing fraud in commodity futures transactions on any single group. Section 4b was enacted simply to prevent conduct that section 3 characterized as an "obstruction" to commerce and a detriment to the national public interest.

The Court's decision in *California v. Sierra Club*, ____U.S.____, 49 U.S.L.W. 4441 (April 28, 1981) is dispositive. In *Sierra Club* the plaintiffs sought injunctive relief under section 10 of the Rivers and Harbors Appropriation Act of 1899 (the "RHAA"), 33 U.S.C. §403, which prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States". The RHAA does not expressly provide a private right of action.

The District Court, however, and the Court of Appeals in *Sierra Club* both recognized an implied right of action. In reversing, this Court held as follows:

> "It was apparently reasoned [by the Court of Appeals] that since Congress enacted a statute that forbids such obstructions in navigable waters, any person who would be 'especially harmed' by an unauthorized obstruction was an especial beneficiary of the Act. But such a definition of 'especial' beneficiary makes this factor meaningless . . . *The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries.*"

____U.S. at____, 49 U.S.L.W. at 4443 [emphasis added].

In *Sierra Club*, as in *Transamerica*, the language of the statute provided the necessary guidance:

> "In ascertaining this intent, the first consideration is the language of the Act. Here, the statute states no more than a general proscription of certain activities; *it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further. Such language does not indicate an intent to provide for private rights of action.*"

Id. [emphasis added].

There is no reason to depart in this case from the sound reasoning of *Sierra Club*. Both the RHAA and the CEA proscribe activities deemed detrimental to commerce. The Congressional concern manifest in both statutes is "not with private rights but with the federal government's ability to respond to obstructions" to commerce. *Sierra Club*, at ____, 49 U.S.L.W. at 4443.

The CEA demonstrates Congress' awareness of the existence of numerous identifiable classes of persons involved in interstate commerce in commodities. Hedgers, speculators, shippers, dealers, millers, commission merchants, exchanges,

floor traders and others all serve essential functions in a field of commerce recognized to be in the national public interest. Despite this recognition of various groups within the industry, Congress chose to define its purpose in Section 3, and to proscribe fraudulent conduct in section 4b, in only the broadest terms. There is no "unmistakable focus" on protecting speculators, the class to which the Currans belong. Absent such "unmistakable focus" an intent to create a private right of action cannot be inferred. *Sierra Club, supra.*

B. Explicit and Implicit Indications of Legislative Intent Show That Congress Did Not Intend to Create a Private Right of Action Under Section 4b.

Transamerica and *Touche Ross* recognize that the heart of the *Cort* analysis is the search for an affirmative intent on the part of Congress to create the private right of action asserted. As noted above, the search for an affirmative congressional intent to create the right of action is not simply a canon of statutory construction. Rather, it is required by article I, section 1 of the Constitution and the doctrine of the separation of powers. The federal judiciary has no power to "imply" or otherwise engraft private causes of action within express statutory schemes. The Judicial Branch may constitutionally only recognize or infer rights of action affirmatively created by Congress, whether that affirmative legislative intent is manifested expressly in statutory language or by implication in statutory structure, context or legislative history. *Sierra Club, supra,* at ____, 49 U.S.L.W. at 4444; *Northwest Airlines, supra,* at ____, 49 U.S.L.W. at 4388-89; *Cannon v. University of Chicago,* 441 U.S. 677, 730-49 (1979) (Powell, J., dissenting); *Rivers v. Rosenthal & Co.,* 634 F.2d 774, 781-82, n.11 (5th Cir. 1980). *See also Transamerica, supra,* at 25 (Powell, J., concurring) (indicating that the approach

taken in *Transamerica* was consistent with his dissent in *Cannon*).

Moreover, where, as here, the statute fails expressly to provide a private judicial right of action while expressly providing for other remedies, an additional right of action cannot be inferred by the courts absent "persuasive evidence of a contrary legislative intent". *Transamerica, supra*, at 20. *See also Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. at 108 (absent a clearly expressed legislative intention to the contrary, the statutory language must ordinarily be regarded as conclusive).

The Court has recently applied this principle with great emphasis. In *Northwest Airlines, supra*, at ____, 49 U.S.L.W. at 4389 the Court held that "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." The CEA's enforcement scheme is at least as comprehensive as those under the Equal Pay Act of 1963, 29 U.S.C. §206(d) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000a, *et seq.*, which the Court deemed sufficient to create a "*presumption*" against inference of an additional private judicial remedy. In *National Sea Clammers, supra*, the Court gave similar effect to the comprehensive enforcement schemes of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§1251, *et seq.* and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§1401, *et seq.*:

> "In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA . . . In the absence of *strong indicia* of a contrary congressional intent, we are *compelled* to

> conclude that Congress provided precisely the remedies it considered appropriate."

____U.S. at ____, 49 U.S.L.W. at 4787 [emphasis added].

In *Rivers, supra*, Judge Reavley quotes the observation of Chief Justice Marshall that "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." 634 F.2d at 792. This Court is now in possession of the fruits of the labor of many able minds that have scoured the many hundreds of pages of legislative history of the CEA and all of the amendments thereto in search of some indication as to what Congress intended (if, indeed, it had any intent whatever) with respect to the creation of a private right of action. The analyses of that legislative history contained in the opinions of Judges Friendly and Mansfield in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), and of Judge Reavley in *Rivers* may fairly be characterized as exhaustive. The briefs filed with this Court in the appeals from *Leist* (Docket Nos. 80-757, 895, 936), including those of distinguished *amici curiae*, offer further discussion of the debates, testimony and reports contained within that legislative history. All of this scholarly exposition, including (perhaps especially) that offered by those arguing in favor of the private right of action, should lead the Court to the inescapable conclusion that there simply is *no clearly expressed, persuasive evidence*, within the legislative history, sufficient to rebut the presumption that Congress did not intend to create a private right of action under section 4b.

The references to the legislative history relied upon by the majority below are insufficient to establish an affirmative intent on the part of Congress to create the private right of action here asserted. The majority opinion refers to the remarks of Representative Poage[44] as support for the proposition that

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[44] 119 Cong. Rec. 41333 (1973).

"Congress recognized that the 'courts had implied a private remedy for individual litigants in the Commodity Exchange Act.' " (A31) Representative Poage was, in fact, citing such private litigation as a threat to the self-regulatory activities of exchanges and as "solid reason for [the exchanges] shrinking the protection given the customer and the public through self-regulation".[45] In context, Representative Poage was citing private litigation as a discordant note in the regulatory scheme and as further reason for "Congress to act, and act expeditiously through meaningful, thoughtful change that is well reasoned and sure"[46] to provide the comprehensive, coherent and balanced regulatory scheme embodied in the 1974 Amendments.

Similarly misplaced is the majority's reliance (A31, n. 27) upon comments made during Senate hearings on the 1974 Amendments.[47] The testimony cited includes that of Professor Schotland, who argued emphatically for enactment of the private civil damage remedy contained in the Hart Bill.[48] Professor Schotland also argued forcefully *against* the broad private reparation proceedings ultimately enacted as section 14. The thrust of Professor Schotland's remarks was that adjudication of private damage claims should be in the courts and not in the CFTC. He argued to the Congress that "[i]f you do choose to retain such virtually unprecedented responsiblity and burden [section 14 reparation proceedings] in this regulatory body, there should be explicit language in the

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[45] *Id.*

[46] *Id.*

[47] *Commodities Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 205, 737 (1974).

[48] S. 2837, 93d Cong. 1st Sess., §505(a), 119 Cong. Rec. 42688 (1973).

statute that Federal and State courts are still open if a complainant prefers to go to trial there."[49]

Indeed, there were three bills introduced in the 93d Congress that would expressly have provided a private right of action for damages in the federal courts for redress of violations of the CEA.[50] The Hart Bill, for example, would have provided a right of action for restitution in the federal district courts for a non-willful violation of "any provision of this Act or regulation or order issued thereunder," with a treble damage remedy for willfull violations. None of the three bills were enacted. As the 1974 Amendments make clear, Congress acted contrary to the recommendations of Professor Schotland, deciding in favor of granting jurisdiction over private damage claims to the CFTC under section 14 and against an alternative private remedy in the federal courts.

The majority below also relied on the remark of Senator Clark that "§201 of [H.R. 13113] may prohibit all court actions"[51] as evidence that the proviso to section 2(a)(1), 7 U.S.C. §2, was added to preserve a private damages action in the federal courts. The proviso states that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State". A far more compelling explanation for the addition of the proviso, however, is contained in the statements of Representative Rodino, Chair-

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[49] *Commodities Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 737 (1974) (statement of Prof. Schotland).

[50] S. 2837 (Hart Bill), 93d Cong., 1st Sess., §505(a)-(b), 119 Cong. Rec. 42688 (1973); H.R. 11195 (Smith Bill), 93d Cong., 1st Sess. §17 (1973) (treble damages); S. 2578 (McGovern Bill), 93d Cong., 1st Sess., Part I, §20, 119 Cong. Rec. 33947-48 (1973) (treble damages).

[51] *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess., 205 (1974) (statement of Sen. Clark).

man of the House Committee on the Judiciary[52] and the testimony of Deputy Assistant Attorney General Keith Clearwaters. Both witnesses directly attacked the exclusive jurisdiction provision of section 2, to which the proviso was eventually added,[53] expressing the concern that the all-encompassing language of section 2, allocating to the CFTC exclusive jurisdiction over the futures trade, was so broad that it even "could be interpreted to deprive Federal courts of their jurisdiction under the antitrust laws and to deprive Federal and State courts of jurisdiction to enforce contract and commercial law rights" in the futures areas.[54] The Rodino-Clearwaters statements, unlike the passing remark of Senator Clark, are derived from extensive and pointed attacks on the very section that the proviso later served to amend and are directed to the question of jurisdiction as opposed to a single cause of action. As a result, they offer a more persuasive explanation for the addition of the proviso. *Rivers, supra*, at 787. The remark of Senator Clark, a passing reference by a single legislator, is a slim reed upon which to base a finding that Congress approved a private right of action. *Consumer Products Safety Commission v. GTE Sylvania, Inc., supra*, at 118; *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 31-32 (1977); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *Leist, supra*, at 352 (Mansfield, J., dissenting). In view of the lengthy and authoritative House and Senate Reports on the 1974 Amendments, both of which are silent as to the existence of any private judicial right of action, the remarks of Senator Clark and their bearing on the construction of section 2(a)(1) as the basis for a private judicial right of action are entitled to little weight.

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[52] *Id.* at 259-260.

[53] *Id.* at 663-64.

[54] *Id.* at 663.

Further, in *Touche Ross, supra*, at 577, the Court declared that reliance upon the general jurisdictional provision of a statute in attempting to infer a private right of action is misplaced and that the source of a plaintiff's rights "must be found, if at all, in the substantive provisions" of the Act sought to be enforced. *See also National Sea Clammers, supra*, at ____; 49 U.S.L.W. at 4787-88. There is, of course, no substantive provision in the CEA for a private judicial right of action.

The majority's attenuated reliance upon the proviso of section 2(a)(1) as the source of a private right of action disregards the plain fact that when Congress wishes to provide a private damages remedy it knows how to do so and does so expressly. *Transamerica, supra*, at 21; *Touche Ross, supra*, at 572.

Reliance by the majority below upon the remarks of Senator Talmadge is also misplaced. The Senator's statement that under the statutory reparation proceedings "the entire *appeal* process and the right of *final* determination by the courts are expressly preserved" (emphasis added), plainly does not support an inference that original *trial* jurisdiction over private damage claims also exists.

The authoritative Senate Report on the 1978 Amendments makes it plain that Congress was aware that no private right of action was included within the regulatory scheme following the 1974 Amendments. The Senate Report includes a comprehensive list of public and private remedies provided customers under the CEA and conspicuously fails to include any reference to a private judicial remedy:

> "The Commodity Exchange Act provides many customer protections and remedies. The Act directs the Commission to promulgate and administer a regulatory program that includes registration of commodity professionals, segregation of customers'

> funds by futures commission merchants, establishment of dual trading guidelines, creation of a procedure for the adjudication of reparation claims, monitoring exchange arbitration procedures and disciplinary actions, and licensing of industry self-regulatory futures associations. Moreover, customers are afforded protection through the Commission's power to sue directly for injunctive relief and to invoke a full range of administrative remedies where appropriate to curb unlawful behavior."[55]

While the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, particularly so when the intent of the enacting Congress is obscure. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

The 1978 Amendments are also of significance insofar as they provided for the *parens patriae* actions by state attorneys general to bring suit, on behalf of residents of their respective states, to enjoin violations of the CEA.[56] The district courts of the United States are expressly granted jurisdiction over such actions, brought by state attorneys general, "to enforce any liability or duty created by this chapter or any rule, regulation, or order of the Commission thereunder, or to obtain damages or other relief with respect thereto". Section 6d also requires the state, immediately upon instituting such a suit, to notify the Commission and provide the Commission with a copy of the Complaint. The Commission is also granted rights to intervene in the suit, be heard on all matters, and file an appeal.

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[55] S. Rep. No. 95-850, 95th Cong., 2d Sess. 12-13, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087, 2100-01.

[56] Section 6d, 7 U.S.C. §13a-2.

The significance of section 6d in the context of the instant suit is apparent. The 95th Congress *expressly* authorized *parens patriae* actions for injunctive relief and damages; it *expressly* provided for jurisdiction in the federal district courts; it carefully provided for participation by the CFTC in such suits to preserve the Commission's ability to provide cohesiveness and consistency in the administration of the Act. It is simply illogical to infer that Congress enacted section 6d with such specificity and with such retention of control within the CFTC while at the same time *implicitly* granting a private right of action for individuals in the federal courts, free of any Commission restraint or participation.

The majority below also based its inference of a private right of action upon its finding that "Congress was aware of the fact that the federal courts had implied the existence of a private right of action under the CEA" prior to the 1974 Amendments and upon the rule of statutory construction that Congress is presumed to be aware of existing constructions of statutes and does not intend to overrule them if the provision is reenacted in substantially the same form. (A31, n.27) The Court of Appeals' reasoning is incorrect. First, the majority's reference to holdings of "the federal courts" is overbroad. The United States Supreme Court had not spoken on the subject. In fact, only lower federal courts in a very few jurisdictions had considered the issue. Second, there is no evidence that the Congress as a whole, in considering the 1974 Amendments, was aware of these lower federal court decisions. As noted above, in the voluminous legislative history of the 1974 Amendments there are only a few isolated and fleeting references to a private right of action and some of those remarks, such as those of Representative Poage quoted above, were critical of the effect such actions would have on the regulatory scheme. Finally, the canon of statutory construction relied upon applies only if the provision is reenacted in substantially the same form. The CEA can hardly be said to

have retained substantially the same form following the 1974 Amendments. It was, in fact, "completely overhauled",[57] providing, for the first time, pervasive and meticulously detailed regulation by a new agency, the CFTC, created for just that purpose. Most significantly, it contained a new provision, section 14, which provided for administrative reparation proceedings that totally obviate the need for and undermine any basis for inferring the existence of a private right of action. As the Court stated in *Rivers*, *supra*, at 784, "[s]o significant a transfiguration of the extant statutory framework is, itself, a wholesale obliteration of the prior status quo and sufficient reason for declining to adopt [the analytical approach grounded in the reenactment doctrine]." *See also Leist*, *supra*, at 339-353 (Mansfield, J., dissenting).

Judge Reavley, writing for the Fifth Circuit in *Rivers*, aptly summarized as follows his Court's attempt to glean, from the background and legislative history of the CEA, guidance on the private right of action issue:

> "The foregoing analysis of the language, structure and legislative history of the 1974 version of the CEA and its 1978 amendments obviously has yielded a result that might be described as emphatically equivocal. Although some individual passages or aspects of the Act appear to give some insight, these inferences frequently conflict with those from other passages or, upon closer examination, their apparent persuasiveness dims or vanishes. Chief Justice Marshall once observed that '[w]here the mind labors to discover the design of the legislature, it seizes upon everything from which aid can be derived' . . . *United States v. Fisher*, 2 Cranch. 358, 386 (1805) . . . After our analysis of the legislative

[57] H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 1 (1974).

> material and decisions of other courts on this question, we might add that in this metaphysical pursuit of prescience the mind often snatches at shadows and mirages in its attempt to discern evidence of such Congressional design — a singularly inappropriate base upon which to predicate an implied private cause of action.
>
> "The net result of our study and deliberations in this case is the determination that the language and legislative history of the CEA and CFTCA, dissected by all of the varied and even conflicting canons of construction, simply do not provide any clear indication of congressional intent either to approve or deny an implied right of action. In such a case . . . given the absence of clear evidence of the requisite affirmative congressional intent to create or provide such a cause of action — we are bound to refuse plaintiff's suit."

634 F.2d at 792.

C. Implication of a Private Right of Action is Inconsistent with the Underlying Purposes of the Legislative Scheme.

The underlying purpose of the 1974 Amendments was to bring regulation of commodity futures trading and all related activities within the exclusive jurisdiction and comprehensive regulatory purview of a single agency, the CFTC, created for that express purpose.[58] The Commission was given broad responsiblity for regulation of all aspects of the markets and plenary powers to enforce compliance with the statutory pro-

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[58] Section 2(a)(1), 7 U.S.C. §2; S. Rep. No. 95-850, 95th Cong., 2d Sess., *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087.

visions of the CEA and the rules, regulations and orders of the Commission issued pursuant thereto.

In drafting and considering the 1974 Amendments, Congress heard testimony from and balanced the interests of all segments of the commodity futures industry. For example, the statutory power given the Commission in section 6(b), 7 U.S.C. §9, to fine persons found to have violated the CEA or rules, regulations or orders of the Commission, up to $100,000 for each violation is tempered by the admonition of section 6(d), 7 U.S.C. §9a, that the Commission shall consider "the appropriateness of such penalty to the size of the business of the person charged, [and] the extent of such person's ability to continue in business . . ."

In granting exclusive jurisdiction to the CFTC and giving that agency comprehensive regulatory authority over the commodity futures market, Congress charged the Commission with responsibility for the effectiveness of the overall market. The solicitude manifest in section 6(d) for the viability of participants in that market reveals a very careful balancing by the Congress of the interests, needs and responsibilities of the diverse elements that comprise the entire commodity futures industry. This careful balancing by Congress is demonstrated in other provisions of the CEA which show that an implied right of action is inconsistent with the statutory scheme.

Congress' awareness of the threat to its unified regulatory scheme posed by private action suits is manifest in the provisions of section 6d, 7 U.S.C. §13a-2. That section preserves, as noted above, a degree of commission control over *parens patriae* actions by requiring that the Commission be advised of the filing of such actions, be provided with a copy of the Complaint, and have a right to intervene in such suits and be heard on all matters arising therein. Again in evidence is the balancing by the Congress of competing interests: Congress

expressly provides for private damage actions, while Commission participation therein meets the perceived necessity to maintain an element of perspective and responsiblity for the overall well-being of the market.

The very carefully circumscribed jurisdiction the CEA expressly confers upon the federal courts[59] is another essential element of its balance. By enactment of the provisions for resolution of customer disputes, sections 5a(11) and 14, 7 U.S.C. §§7a(11), 18, Congress chose *not* to impose upon registered persons such as Merrill Lynch the substantial expense and disruptive impact of federal litigation of private damage claims, *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-43 (1975), the burden of which would of necessity be passed on to the overall market in the form of higher commissions and diminished efficiency. Judicial creation of a right to litigate in federal court all alleged breaches of duties claimed to exist under section 4b would drastically alter the balance inherent in the legislative scheme.

By enacting the 1974 Amendments Congress sought to achieve at least three concomitant objectives: (1) to promote the benefits to the national economy and public interest that an orderly futures market provides; (2) to provide protection and redress for persons who participate in and rely on those markets; (3) to insure the viability of and provide regulatory protection to the FCMs, commodity trading advisors, commodity pool operators, floor brokers and contract markets that comprise the industry itself. The CEA expresses the

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[59] Section 6b, 7 U.S.C. §13a (jurisdiction to enforce orders of the CFTC); Section 6c, 7 U.S.C. §13a-1 (jurisdiction in mandamus and injunctive actions by the Commission); Section 6d, 7 U.S.C. §13a-2 (jurisdiction in *parens patriae* suits); Section 6(b), 7 U.S.C. §15 (enforcement of subpoena powers); Sections 14(f), (g), 7 U.S.C. §§18(f), (g) (enforcement and review of reparation awards); Section 9, 7 U.S.C. §13 (and 18 U.S.C. §3231) (jurisdiction in criminal actions).

wisdom of Congress as to how those at times competing interests are best served. Important, then, is the admonition of the Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978): "[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other". The CEA's silence on private rights of action in the federal courts is purposeful. Judicial creation of a private right of action would disrupt the balance achieved by Congress and thwart the purposes of the Act. *See Northwest Airlines, supra*, at ____; 49 U.S.L.W. at 4389.

D. The State-Federal Concern Element of *Cort* Does Not Support Inference of a Private Right of Action Under Section 4b.

The fourth consideration set forth in *Cort* is whether the asserted cause of action is one relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law. Under the circumstances of this case, with specific reference to the statutory framework of the CEA and the section 14 reparation proceedings, that consideration becomes inapplicable.

Cort considered the question of whether a federal criminal statute, prohibiting corporations from making contributions or expenditures in connection with federal elections, gives rise to a private right of action by a shareholder against the corporation in the event of such illegal expenditures. The Court noted that regulation of the internal affairs of corporations was an area traditionally relegated to state law, and the laws of the various states regarding corporate contributions in connection with state elections put shareholders on notice as to how their funds may permissibly be used. The Court was

"necessarily reluctant to imply a federal right to recover funds used in violation of a federal statute where the laws governing the corporation may put a shareholder on notice that there may be no such recovery". 422 U.S. at 84-85.

The situation presented here is fundamentally different yet there is an equally compelling reason to reject the asserted right of action in the federal courts. With the very limited exception of the enforcement of contractual commercial rights inhering in contracts for the future delivery of commodities, which the CEA does not purport to regulate and which remain within the province of state law,[60] the CEA is preemptive of state law.[61] The CEA manifestly makes regulation of commodity futures trading a federal concern. However, in so doing it is similarly preemptive of any implied private right of action in the federal courts. By expressly providing the means for redress, before the CFTC, for losses sustained as a result of violations of the Act, it forecloses the basis for any inferred right of action. *Cort* declined to infer a private federal right of action that would contravene the fair expectations that shareholders could derive from controlling state law. The same deference should here be accorded to expectations generated by the express provisions of the CEA.

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[60] Section 2(a)(1), 7 U.S.C. §2.

[61] As noted in Merrill Lynch's petition for certiorari, at 13, fraud actions such as this one have been a traditional subject of state court litigation. However, state court jurisdiction, except over contract and commercial rights, has been preempted by the "exclusive jurisdiction" of the CFTC. Arbitration under section 5a(11), 7 U.S.C. §7a(11) and reparation proceedings under section 14, 7 U.S.C. §18, are the exclusive means under the CEA for resolution of customer claims.

CONCLUSION

For the foregoing reasons, Petitioner Merrill Lynch respectfully requests that the Court vacate the Judgment of the Court of Appeals with respect to the existence of a private right of action under CEA section 4b.

Respectfully submitted,

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CODE OF FEDERAL REGULATIONS (17 C.F.R.)
COMMODITY FUTURES TRADING COMMISSION
RULES RELATING TO REPARATION PROCEEDINGS

PART 12—RULES RELATING TO REPARATION PROCEEDINGS

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AUTHORITY: (Pub. L. 93-463, Sec. 101(a)(3), 88 Stat. 1391 (7 U.S.C. 4j); Sec. 106, 88 Stat. 1393 (7 U.S.C. 18); 31 U.S.C. 483a).

SOURCE: 41 FR 3999, Jan. 27, 1976, unless otherwise noted.

Subpart A—General Information

§ 12.1 Scope and applicability of rules of practice relating to reparation proceedings.

These rules of practice are applicable to reparation proceedings pursuant to section 14 of the Commodity Exchange Act, as amended, 7 U.S.C. 18. The rules in this part shall be construed liberally so as to secure the just, speedy and inexpensive determination of the issues presented with full protection for the rights of all parties to the proceedings envisioned by the Commodity Exchange Act, as amended.

§ 12.2 Applicability of other rules of practice promulgated under the Commodity Futures Trading Commission Act.

Unless specifically made applicable, other Rules of Practice promulgated under the Commodity Exchange Act, as amended, shall not apply to reparation proceedings.

§ 12.3 Definitions.

For purposes of this part:

(a) "Act" means the Commodity Exchange Act, as amended, 7 U.S.C. 1, et seq.;

(b) "Administrative Law Judge" means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105;

(c) "Administrative Procedure Act" means those provisions of the Administrative Procedure Act, as codified, which are contained in 5 U.S.C. 551 through 559.

(d) "Commission" means the Commodity Futures Trading Commission;

(e) "Complainant" means a person who has applied to the Commission seeking a reparation award pursuant to Section 14 of the Act, 7 U.S.C. 18;

(f) "Complaint" means any document initiating a reparation proceeding pursuant to section 14(a) of the Act, 7 U.S.C. 18(a), whether designated a complaint or petition or otherwise;

(g) "Division of Enforcement" means that office in the Commission which, among other things, prosecutes in accordance with the Commission's rules of practice contained in Part 10 of this chapter;

(h) "Hearing" means that part of a proceeding which involves the submission of evidence, either by oral presentation or written submission;

(i) "Hearing Clerk" means that member of the Commission's staff designated as such in the Commission's Office of Hearings and Appeals;

(j) "Order" means the whole or any part of a final procedural or substantive disposition of a reparation proceeding by the Commission or by the Presiding Officer;

(k) "Party" includes a complainant, respondent and any other person or agency named or admitted as a party to a reparation proceeding;

(l) "Person" includes an individual, partnership, corporation, association, exchange or other entity or organization;

(m) "Petition" means any document initiating a reparation proceeding pursuant to section 14(a) of the Act, 7 U.S.C. 18(a), whether designated a petition or complaint or otherwise;

(n) "Pleading" means the complaint, the answer to the complaint, any supplement or amendment thereto, and any reply that may be permitted to

any answer, supplement or amendment;

(o) "Presiding Officer" means (1) an Administrative Law Judge in all matters where the amount of damages claimed exceeds $2,500 ($5,000 where the complaint is filed with the Commission on or after October 1, 1978) and all cases where the amount of damages claimed is less than $2,500 ($5,000 where the complaint is filed with the Commission on or after October 1, 1978) but where the Commission has determined that a hearing is necessary; and (2) a member of the Commission, an Administrative Law Judge, a Hearing Officer, or such other Commission employee as may be designated by the Commission to conduct the proceeding in all other matters where the amount of damages claimed in the complaint is less than $2,500 ($5,000 where the complaint is filed with the Commission on or after October 1, 1978);

(p) "Proceeding" includes any reparation proceeding and any proceeding conducted pursuant to the rules of practice set forth in Part 10 of this chapter;

(q) "Registrant" means any person who is registered or required to be registered under section 4d, 4e, 4k or 4m of the Commodity Exchange Act, as amended, as a futures commission merchant, floor broker, person associated with a futures commission merchant or agents thereof, commodity trading advisor or commodity pool operator;

(r) "Respondent" means any person against whom a complainant seeks a reparation award pursuant to Section 14 of the Act, 7 U.S.C. 18;

(s) "Reparation award" refers to the amount of damages a respondent may be ordered to pay as provided in section 14(e) of the Act, 7 U.S.C. 18(e);

(t) "Reparation proceeding" means a proceeding pursuant to which a complainant seeks a reparation award against one or more respondents in accordance with section 14 of the Act, 7 U.S.C. 18.

(Secs. 2a(11), 8a(5) and 14 of the Commodity Exchange Act, 7 U.S.C. 4a(j), 12a(5) and 18, as amended by Pub. L. 95-405, sec. 21, 92 Stat. 875-6)

[41 FR 4000, Jan. 27, 1976, as amended at 44 FR 1202" Mar. 5, 1979]

§ 12.4 Business address; hours.

The principal office of the Commission is located at 1007 21st Street NW., Washington, D.C., and its mailing address is 2033 K Street NW., Washington, D.C. 20581, telephone: (202) 254-7424. It is open each day, except Saturdays, Sundays and legal public holidays from 8:15 a.m. to at least 4:45 p.m., eastern standard time or eastern daylight savings time, whichever is currently in effect in Washington, D.C. If Commission personnel are present in the offices after 4:45 p.m., they may, at their discretion, accept documents for filing and serve the public in other matters within the scope of this Part. Legal holidays include New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other legal holidays recognized by the Federal Government.

[41 FR 3999, Jan. 27, 1976, as amended at 41 FR 28260, July 9, 1976]

§ 12.5 Suspension, amendment, revocation and waiver of rules.

(a) These rules may, from time to time be suspended, amended or revoked in whole or in part. Notice of such action will be published in the FEDERAL REGISTER.

(b) In the interest of expediting decision or to prevent undue hardship on any party or for other good cause the Commission may order the adoption

of expedited procedure: and may waive any rule in Subparts D through H of this part in a particular case and may order proceedings in accordance with its direction upon a determination that no party will be prejudiced and that the ends of justice will be served. Reasonable notice shall be given to all parties of any action taken pursuant to this provision.

(c) The Presiding Officer, to expedite decision or to prevent undue hardship on any party may waive any rule in Subparts D through G of this part, when neither party is prejudiced thereby. Reasonable notice shall be given all parties of any action taken pursuant to this provision.

§ 12.6 Computation of time.

In computing any period of time prescribed by these rules or allowed by the Commission, or the Presiding Officer, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. Intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation only when the period of time prescribed or allowed is less than seven (7) days.

§ 12.7 Changes of time permitted for filing.

Except as otherwise provided by law or by these rules, for good cause shown, the Commission, or the Presiding Officer before whom a matter is then pending, on their own motion or the motion of a party, may at any time extend or shorten the time limit prescribed by the rules for filing any document. In any instance in which a time limit is not prescribed for an action to be taken in a proceeding, the Commission or the Presiding Officer may set a time limit for that action.

§ 12.8 Date of entry of orders.

In computing any period of time involving the date of the entry of an order the date of entry shall be the date the order is served with the Hearing Clerk.

§ 12.9 Ex parte communications in reparation proceedings.

(a) *Definitions.* For purposes of this section:

(1) "Commission decisional employee" means employees of the Commission who are or may reasonably be expected to be involved in the decision-making process in any proceeding, including, but not limited to:

(i) Members of the personal staffs of the Commissioners;

(ii) Members of the staffs of the Administrative Law Judges;

(iii) The Chief and members of the Opinions section;

(iv) Members of the staff of the Office of Hearings and Appeals; and

(v) Other Commission employees who may be assigned to hear or to participate in the decision of a particular matter;

(2) "Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports on any matter or proceeding covered by this Part;

(3) "Interested person" includes parties and other persons who might be adversely affected or aggrieved by the outcome of a proceeding; their officers, agents, employees, associates, affiliates, attorneys, accountants or other representatives; and any other person havinga direct or indirect pecuniary or other interest in the outcome of a proceeding;

(4) "Party" includes a complainant, respondent and any other person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, to a reparation proceeding, and a person or agency permitted limited participation or to state views in a reparation proceeding by the Commission.

(b) *Prohibitions against ex parte communications.* (1) No interested person outside the Commission shall make or knowingly cause to be made to any Commissioner, Administrative Law Judge or Commission decisional employee an ex parte communication relevant to the merits of a proceeding.

(2) No Commissioner, Administrative Law Judge or Commission decisional employee shall make or knowingly cause to be made to any interested person outside the Commission an ex parte communication relevant to the merits of a proceeding.

(c) *Procedures for handling ex parte communications.* A Commissioner, Administrative Law Judge or Commission decisional employee who receives, or who makes or knowingly causes to be made, an ex parte communication prohibited by paragraph (b) of this section shall:

(1) Place on the public record of the proceeding:

(i) All such written communications;

(ii) Memoranda stating the substance of all such oral communications; and

(iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (c)(1)(i) and (1)(ii) of this section; and

(2) Promptly give written notice of such communication and responses thereto to all parties to the proceedings to which the communication or responses relate.

(d) *Sanctions.* (1) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party in violation of the prohibition contained in paragraph (b)(1) of this section, the Commission, Administrative Law Judge or other Commission employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR 14.8(c).

(3) Any Commissioner, Administrative Law Judge or Commission decisional employee who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in conduct of the type proscribed by 17 CFR 140.735-3(b)(3).

(e) *Applicability of prohibitions and sanctions against ex parte communications.* (1) The prohibitions of this section against ex parte communications shall apply:

(i) To any person who has actual knowledge that a proceeding has been or will be commenced by order of the Commission; and

(ii) To all persons after public notice has been given that a proceeding has been or will be commenced by order of the Commission.

(2) The prohibitions of this section shall remain in effect until a final order has been entered in the proceed-

ing which is no longer subject to review or reconsideration by the Commission or to review by any court.

(3) Nothing in this section shall constitute authority to withhold information from Congress.

(Sec. 4, Pub. L. 94-409, 90 Stat. 1246, 1247 (5 U.S.C. 551(14), 556(d) and 557(d)); sec. 101 (a)(11), Pub. L. 93-463, 88 Stat. 1391 (7 U.S.C. 4a(j) (Supp. V, 1975)).)

[42 FR 13701, Mar. 11, 1977]

§ 12.10 Separation of functions.

(a) A Presiding Officer will not be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Commission engaged in the performance of investigative or prosecutorial functions for the Commission.

(b) No officer, employee, or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the decision of the Presiding Officer, except as a witness or counsel in the proceeding, without the express written consent of the respondents in the proceeding. This provision shall not apply to the Commission or a member or members of the Commission.

§ 12.11 Appearance and practice before the Commission.

(a) *Appearance*—(1) *By non-attorneys.* An individual may appear pro se (in his own behalf), a member of a partnership may represent the partnership, a bona fide officer of a corporation, trust or association may represent the corporation, trust or association.

(2) *By attorneys.* An attorney-at-law who is admitted to practice before the highest Court of any State or territory or of the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with provisions of Part 14 of this Chapter may represent parties as an attorney in proceedings before the Commission.

(b) *Practice Before the Commission.* Any person may practice before the Commission in connection with a reparation proceeding who has not been suspended or disbarred from appearance or practice before the Commission in accordance with provisions of Part 14 of this Chapter.

(c) *Debarment of Counsel or Representative by Presiding Officer During the Course of a Proceeding.* (1) Whenever, while a proceeding is pending before him, the Presiding Officer finds that a person acting as counsel or representative for any party to the proceeding is guilty of contemptuous conduct, the Presiding Officer may order that such person be precluded from further acting as counsel or representative in such proceeding. An immediate appeal to the Commission may be taken from any such order, pursuant to the provisions of § 12.47, but the proceeding shall not be delayed or superseded pending disposition of the appeal; *Provided,* That the Presiding Officer may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(2) Whenever the Presiding Officer has issued an order precluding a person from further acting as counsel or representative in the proceeding, the Presiding Officer, within a reasonable time thereafter, shall submit to the Commission a report of the facts and circumstances surrounding the issuance of the order and shall recommend what action the Commission should take respecting the appearance of such person as counsel or representative in other proceedings before the Commission.

Subpart B—Initial Procedure With Respect to Reparation Complaints

§ 12.21 Complaint.

Any person complaining of any violation of any provision of the Act or any rule, regulation, or order thereunder by any person who is registered or required to be registered with the Commission under sections 4r, 4e, 4k or 4m of the Act as a futures commission merchant, floor broker, person associated with a futures commission merchant or agents thereof, commodity trading advisor or commodity pool operator may, at any time within two years after the cause of action accrues, apply to the Commission for a reparation award by petitioning the Commission to determine the amount of damage, if any, to which the complainant is entitled as a result of the violation and to issue an order directing the offender to pay that amount to the complainant on or before a date fixed by the order; *Provided,* That no such application shall be considered with respect to claims that arose prior to January 23, 1975.

(a) *Form of complaint.* A complaint submitted to the Commission pursuant to this section shall briefly state the facts that are claimed to constitute a violation of any provision of the Act or any rule, regulation or order thereunder. The facts should be set forth in a manner that will permit each fact to be admitted or denied, as the case may be, by the person or persons alleged to have committed the violations. Each complaint shall include:

(1) The name and residence address of the complainant;

(2) The name and address, if known, of each person alleged in the complaint to have violated the Act or any rule, regulation or order thereunder;

(3) If possible, the specific provisions of the Act, rule, regulation or order claimed to have been violated;

(4) All relevant facts concerning each and every act or omission which it is claimed constitute a violation, including the date and place of each alleged act or omission;

(5) Facts showing the manner in which it is claimed the complainant was injured by the alleged violations;

(6) The amount of damages the complainant claims to have suffered and the method by which those damages have been computed; and

(7) A statement that no arbitration proceeding or civil court litigation, based on the same facts set forth and against the same parties named as respondents in the complaint, has been instituted or is presently pending.

(b) *Subscription and verification of the complaint; exhibits.* Each complaint shall be signed personally by an individual complainant or by a duly authorized officer or agent of a complainant who is not a natural person. His signature shall be given under oath attesting either that he knows the facts set forth in the complaint to be true, or that he believes the facts set forth to be true, in which event the information upon which he formed that belief shall be set forth with particularity. A true copy of each and every document possessed by or available to the complainant which evidences the facts set forth in the complaint shall be annexed to the complaint.

(c) *Time and place of filing of complaint.* A complaint shall be filed by delivering a copy thereof, in proper form, to the Commission at its principal offices in Washington, D.C., addressed to the attention of the Reparations Section. The complaint may be filed in person, during normal business hours, or by mail.

(d) *Bond required if complainant is non-resident.* If a petition for reparations is filed by a non-resident of the United States, the complainant shall first file a bond in double the amount of the claim either with a surety company approved by the Treasury Department of the United States as surety or with two personal sureties, each of whom shall be a citizen of the United States and shall qualify as financially responsible for the entire amount of the bond. The bond shall run to the respondent and be conditioned upon the payment of (1) costs, including reasonable attorney's fees, for the respondent if the respondent shall prevail; and (2) any reparation award that may be issued by the Commission against the complainant on any counterclaim asserted by respondent: *Provided,* That the furnishing of a bond may be waived if the complainant is a resident of a country which permits filing of a complaint by a resident of the United States against a citizen of that country without the furnishing of a bond.

(Secs. 2a(11), 8a(5) and 14 of the Commodity Exchange Act, 7 U.S.C. 4a(j), 12a(5) and 18, as amended by Pub. L. 95-405, sec. 21, 92 Stat. 875-6)

[41 FR 4001, Jan. 27, 1976, as amended at 44 FR 12027, Mar. 5, 1979]

§ 12.22 Notification to registrant of complaint.

If, in the opinion of the Commission, the facts set forth in a complaint warrant such action, a copy of the complaint, together with any attachments thereto, shall be forwarded by registered mail, certified mail, or otherwise by the Commission to each registrant named therein at an office previously designated with the Commission by the registrant for receipt of reparation complaints or, if no such designation has been filed with the Commission, at the registrant's principal place of business as shown in the records of the Commission. The complaint shall not be forwarded if it appears, in the opinion of the Commission, that the alleged facts, even if true, do not evidence a violation of the Act or any rule or regulation or order thereunder or do not show that the complainant suffered damages as a result of the alleged violation. If the Commission should determine not to forward the complaint to the registrant in accordance with this section, no proceeding shall be held thereon and the complainant shall be notified to that effect, but this decision shall be without prejudice to the right of the complainant to seek such alternate forms of relief as may be available.

§ 12.23 Response to complaint.

Within forty-five (45) days after the complaint was forwarded by registered mail, certified mail, or otherwise to the registrant, or within such further time as the Commission may permit, each registrant shall either satisfy the complaint or answer it in writing.

(a) *Satisfaction of Complaint.* A registrant may satisfy the complaint by paying to the complainant either the amount to which the complainant claims to be entitled as set forth in the complaint or such other amount as the complainant will accept in satisfaction of his claim. If a complaint is satisfied, a notice of satisfaction and withdrawal of the complaint as to that registrant, duly executed by the complainant and registrant before a notary public, shall be filed with the Commission in substantially the following form:

[Caption]

Registrant ———— [Name] having satisfied the reparation complaint filed against him on ———— [Date], by ————[Name], that complaint is hereby withdrawn. Registrant, by satisfying that complaint neither admits nor denies violating any provision of the Commodity

Exchange Act, as amended, or any rule, regulation or order thereunder.

_____
Complainant

_____
Registrant

[Jurat]

If the complainant should fail or refuse to execute a notice of satisfaction and withdrawal of the complaint after the registrant has paid the complainant the amount to which the complainant has claimed to be entitled, the registrant may serve upon the complainant and file with the Commission an affidavit of satisfaction setting forth facts showing that the payment has been made. Upon the filing of a notice of satisfaction and withdrawal of the complaint as to a registrant, the proceeding shall be discontinued as to that registrant and no reparation award shall thereafter be entered against that registrant in favor of that complainant based upon the violations alleged in that complaint. In the absence of objection thereto by the complainant, an affidavit of satisfaction shall have the same effect as a notice of satisfaction and withdrawal of the complaint.

(b) *Answer*—(1) *Form and content.* The answer shall contain a precise and detailed statement of the facts which constitute the grounds for defense, and shall specifically admit, deny, or explain each of the allegations of the complaint. If the registrant is without knowledge or information sufficient to form a belief as to the truth of an allegation, he shall so state, and this will have the effect of a denial. An answer may state that the registrant admits all of the allegations of the complaint, or admits liability for a portion, but not all, of the amount claimed as damages. Each answer shall be signed personally by an individual registrant or by a duly authorized officer or agent of the registrant (who has knowledge of the matters set forth in the complaint) if the registrant is not a natural person. His signature shall be given under oath attesting that he has read the answer; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. Where a complainant alleges facts tending to prove that one or more employees or agents of a registrant have participated in the alleged violations, they shall each separately subscribe to and verify the answer or state under oath, in a document appended to the answer, why they have not done so. To the extent that the pleading is not based upon his personal knowledge he shall set forth with particularity the information upon which he believes there is good ground to support the answer. A true copy of each and every document possessed by or available to the registrant, which support the denials or other matters of defense set forth in the answer, shall be annexed to the answer unless they have been annexed to the complaint.

(2) *Counterclaims.* An answer may set forth as a counterclaim facts alleging a violation and a request for a reparation award that would be a proper subject for a complaint under § 12.21 or any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

(3) *Affidavit of service.* The registrant shall file with his answer an affidavit showing that he has served a true copy of the answer upon the complainant, either personally or by mail addressed to the complainant at the address set forth in the complaint.

§ 12.24 Reply.

If the answer asserts a counterclaim, the complainant shall file a reply to

the counterclaim with the Commission within thirty (3) days after service of the answer. The reply shall be strictly confined to the matters alleged in the counterclaim, and shall in all respects conform to the requirements set forth in § 12.23(b) with respect to the form and content and other requirements concerning an answer. A complainant may satisfy a counterclaim, as if it were a complaint, in the manner set forth in § 12.23(a).

§ 12.25 Investigation of complaint.

If there appears to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made in accordance with § 12.21 the Commission may investigate such complaint to the extent and in such manner as it, in its sole discretion, may deem appropriate. If an investigation is undertaken, the Commission may, in its discretion, for that reason delay institution of a formal reparation proceeding.

§ 12.26 Effect of failure to file answer or reply; default.

(a) *Findings and conclusions.* Failure timely to file an answer to a complaint or a reply to a counterclaim shall be treated as an admission of the allegations of the complaint or counterclaim, shall constitute a waiver of hearing on the facts set forth in the complaint or counterclaim, and shall result in the institution of a formal adjudicatory proceeding in accordance with § 12.31 upon the payment of the appropriate filing fee set forth in § 12.27 by either the complainant or registrant. The previously forwarded complaint, and the answer if no reply has been filed to a counterclaim set forth in the answer, shall be deemed to have been served for purposes of the institution of a formal adjudicatory proceeding. The proceeding shall be docketed in accordance with § 12.41 and a Presiding Officer shall be appointed in accordance with § 12.42. The Presiding Officer may thereafter, upon the motion of the complaining party, enter findings and conclusions concerning the questions of violation and damages and may enter an appropriate reparation award. If the facts which are treated as admitted are considered insufficient to support the amount of reparations sought, the proceeding may continue on the question of damages only.

(b) *Setting Aside of Default.* In order to prevent injustice and on such conditions as may be appropriate, the Presiding Officer may at any time for good cause set aside a default order or award obtained under paragraph (a) of this section. Any motion to set aside such a default order shall be made within a reasonable time, and shall state the reasons for the failure to file and specify the nature of the proposed defense in the proceeding.

§ 12.27 Filing fees.

(a) Prior to the institution of a formal adjudicatory proceeding in accordance with § 12.31, the Commission shall serve upon the complainant and registrant a notice informing the parties that the Commission is of the opinion that the facts warrant the institution of a formal adjudicatory proceeding. In the event such notice is sent, a formal adjudicatory proceeding shall commence upon payment by the complainant, within a reasonable period of time, of a filing fee of $25.

(b) Payment of the filing fee shall be by check or money order, payable to the Treasury of the United States.

[41 FR 30587, July 26, 1976]

Subpart C—Institution and Settlement of Formal Adjudicatory Proceeding

§ 12.31 Institution of formal adjudicatory proceeding.

If in the Commission's opinion the

facts warrant such action and upon the payment of the filing fee required by § 12.27, the Commission may, in its discretion, in the manner prescribed in § 12.48, notify the respondent and complainant, by registered or certified mail, that the Commission has instituted a formal adjudicatory proceeding based on the previously forwarded complaint, answer and reply, if any, and that the respondent shall have an opportunity for hearing thereon before an Administrative Law Judge designated by the Commission in a place in which the respondent is engaged in business with due regard given to the convenience of the parties: *Provided*, That in complaints wherein the amount claimed as damages does not exceed the sum of $2,500 ($5,000 where the complaint is filed with the Commission on or after October 1, 1978) a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact in accordance with the summary procedures set forth in § 12.91 through § 12.95 of this Part and notice of the summary procedure will be given in lieu of an opportunity for hearing. A formal reparation proceeding is commenced when a complaint is served in the manner prescribed in this section.

(Secs. 2a(11), 8a(5) and 14 of the Commodity Exchange Act, 7 U.S.C. 4a(j), 12a(5) and 18, as amended by Pub. L. 95-405, sec. 21, 92 Stat. 875-6)

[41 FR 4003, Jan. 27, 1976, as amended at 44 FR 12027, Mar. 5, 1979]

§ 12.32 Discontinuance of proceeding.

If the Commission should determine not to proceed in the manner set forth in § 12.31, the reparation proceeding shall terminate without prejudice to the right of the complainant to seek such alternative forms of relief as may be available to him. If the proceeding should be discontinued the Commission shall promptly give notice to that effect to the complainant by registered or certified mail.

§ 12.33 Admissions of partial liability.

If in the answer the respondent admits liability for a portion, but not all of the amount claimed as damage, and the answer does not assert a counterclaim, the Presiding Officer may, unless the respondent has already made reparation, issue an order directing the respondent to pay the undisputed amount on or before a date fixed in the order. Thereafter liability with respect to the remaining disputed amount shall be determined in accordance with the procedure that would have been followed if no order had been issued by the Presiding Officer with respect to the undisputed sum. If in the reply the complainant admits liability for a portion but not all of the amount claimed as damage, the Presiding Officer may enter an award for that amount and issue an order directing the complainant to pay the undisputed amount on or before a date fixed by the order.

§ 12.34 Settlement—Statements of satisfaction and discontinuance of proceedings.

If, at any time before there has been a final determination by the Commission, the respondent satisfies the complaint, or the complainant and respondent reach an accord as to the amount of damages that will satisfy the complaint and any counterclaim set forth in the respondent's answer, the complainant and respondent shall file with the Commission a signed statement of satisfaction and discontinuance of proceeding. The proceeding will thereafter be discontinued. The statement of satisfaction and discontinuance of proceeding shall be filed with the Commission in substantially one of the following forms:

[Caption]

Respondent ———————— [Name] having satisfied the reparation complaint against him on ———— [Date] by ———————— [Name], that the complaint is hereby withdrawn.

———————
Complainant

———————
Respondent

[Jurat]

or

[Caption]

Respondent ———————— [Name] having satisfied the reparation complaint filed against him on ———— [Date], by ———————— [Name], and the complainant [Name] ———————— having satisfied the counterclaim asserted against him in respondent's answer filed with the Commission on ———— [Date] the complaint and counterclaim are hereby withdrawn.

———————
Complainant

———————
[Jurat] Respondent

If after satisfaction of the complaint or counterclaim the complaining party refuses to sign a Statement of Satisfaction and Discontinuance, a party who has satisfied a claim against him may file with the Commission and serve on the other party a motion for discontinuance to be accompanied by an affidavit setting forth in detail the facts surrounding the satisfaction or a copy of any stipulation entered into by the parties evidencing satisfaction of the complaint or counterclaim. If the motion is uncontested the proceeding will be ordered discontinued.

Subpart D—Formal Adjudicatory Proceeding

§ 12.41 Docketing of proceeding.

Upon service of the notification in accordance with § 12.31, or upon a default or admission of partial liability as set forth in § 12.26 or § 12.33 the Hearing Clerk shall assign a docket number to the proceeding and maintain the official docket. Thereafter the proceeding may be identified by such number.

§ 12.42 Assignment to presiding officer.

Immediately following docketing of the proceeding, the proceeding shall be assigned to the Presiding Officer. To the extent permitted by law, the powers hereinafter conferred upon the Presiding Officer shall be applicable to the Commission.

§ 12.43 Functions and responsibilities of the Presiding Officer.

The Presiding Officer shall be responsible for the fair and orderly conduct of the proceeding and shall have the authority to:

(a) Administer oath and affirmations;

(b) Issue subpoenas;

(c) Rule on offers of proof;

(d) Receive relevant evidence;

(e) Examine witnesses;

(f) Regulate the course of the hearing;

(g) Hold prehearing conferences;

(h) Consider and rule upon all motions;

(i) Make decisions in accordance with § 12.84 and § 12.95;

(j) Certify interlocutory matters to the Commission for its determination in accordance with § 12.47(a)(4);

(k) Take such action as is appropriate if a party or agent of a party fails to comply with an order issued by the Presiding Officer; and

(l) Take any other action required to give effect to these rules regulating to reparation proceedings, including but not limited to requesting the parties to file briefs and statements of position with respect to any issue in the proceeding.

§ 12.44 Disqualification of Presiding Officer.

(a) *At His Own Request.* A Presiding Officer may withdraw from any proceeding when he considers himself to be disqualified. In such event he shall immediately notify the Commission and each of the parties of his withdrawal and of his reason for such action.

(b) *Upon the Request of a Party.* Any party may request a Presiding Officer to disqualify himself on the grounds of personal bias, conflict or similar bases. Interlocutory review of an adverse ruling by the Presiding Officer may be sought without certification of the matter by the Presiding Officer only in accordance with the procedures set forth in § 12.47 (b).

§ 12.45 Amendments and supplemental pleadings.

(a) *Amendments.* At any time prior to the close of the hearing in a reparation proceeding, the Presiding Officer may allow amendments of the pleadings either upon written consent of the parties or for good cause shown.

(b) *Supplemental Pleadings.* Upon reasonable notice, and upon such terms as are just, the Presiding Officer may, upon the motion of a party, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleadings sought to be supplemented and which are relevant to any of the issues involved.

(c) *Response to Amendments and Supplements.* Any party may file a response to any amendment or supplement to a pleading within ten (10) days after date of service upon him of the amendment or supplement.

(d) *Pleadings to Conform to the Evidence.* When issues not raised by the pleadings but reasonably within the scope of a reparation proceeding initiated by the complaint are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

(e) *Subscription and Verification.* All amendments and supplemental pleadings shall be subscribed and verified in the same manner as the pleadings they are amending or supplementing.

§ 12.46 Motions.

(a) *Presentation.* An application for a form of relief not otherwise specifically provided for in these rules shall be made by a motion, which shall be in writing unless made on the record during a hearing. The motion shall state: (1) The relief sought; (2) the basis for relief; and (3) the authority relied upon. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. All motions and applications, unless otherwise provided in these rules, shall be directed to the Presiding Officer prior to the filing of an initial decision in a proceeding, and to the Commission after the initial decision has been filed.

(b) *Answer to Motions.* Any party may serve and file a written response to a motion within ten (10) days after service of the motion upon him or within such longer or shorter period as established by these rules or as the Presiding Officer or the Commission may direct. Any party who does not file a response to a motion shall be deemed to have consented to the relief sought by the motion.

(c) *Motions for Procedural Orders.* Motions for procedural orders, including motions for extension of time, may be acted on at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(d) *Dilatory Motions.* Repetitive or numerous motions dealing with the same subject matter shall not be permitted.

§ 12.47 Interlocutory review by the Commission.

Interlocutory review by the Commission of a ruling on a motion by a Presiding Officer may be sought in accordance with the following procedure:

(a) *Scope of review.* The Commission will not review a ruling of the Presiding Officer prior to the Commission's consideration of the proceeding in the absence of extraordinary circumstances. An interlocutory appeal may be permitted, in the discretion of the Commission, under the following circumstances:

(1) Appeal from a ruling pursuant to § 12.44 on a motion to disqualify a Presiding Officer.

(2) Appeal from a ruling pursuant to § 12.11 suspending an attorney from participation in a reparation proceeding.

(3) Appeal from a ruling pursuant to § 12.72 ordering consolidation of proceedings.

(4) Upon a determination by the Presiding Officer certified to the Commission either in writing or on the record, that (i) a ruling sought to be appealed involves a controlling question of law or policy, (ii) an immediate appeal may materially advance the ultimate resolution of the issues in the proceeding, (iii) subsequent reversal of the ruling would cause unnecessary delay or expense to the parties.

(b) *Procedure to obtain interlocutory review.* (1) An application for interlocutory review may be served and filed within five (5) days after notice of the Presiding Officer's ruling on a matter described in § 12.47(a) (1), (2) or (3) or within five (5) days after a determination is made by a Presiding Officer in the manner described in § 12.47(a)(4).

(2) An application for review shall:

(i) Designate the ruling or part thereof from which appeal is being taken;

(ii) Present the points of fact and law relied upon in support of the position taken; and

(iii) Not exceed 15 pages.

(3) Any party that opposes the application may file a response, not to exceed 15 pages, within five (5) days after service of the application.

(4) The Commission will determine whether to grant a review based upon the application for review and the response thereto, without oral argument or further written presentation, unless the Commission shall otherwise direct.

(c) *Proceedings not stayed.* The filing of an application for review and the grant of review shall not stay proceedings before a Presiding Officer unless the Presiding Officer or the Commission shall so order. The Commission will not consider a motion for a stay unless the motion shall have first been made to the Presiding Officer and denied.

§ 12.48 Service.

(a) *Number of copies; when required.* Two copies of all pleadings, motions, petitions or applications made in the course of a proceeding (unless made orally during a hearing), all proposed findings and conclusions, all petitions for review of any initial decision, and all briefs shall be served by the party upon all parties to the proceeding.

(b) *How service is made.* Service shall be made either by personal service or by first-class mail. Service shall be complete at the time of personal service or upon deposit in the mails of a properly addressed and post-paid document. Where a party effects service by mail, the time within which the person served may respond thereto shall be increased by three (3) days.

(c) *Proof of service.* Proof of service of a document shall be made by filing with the Hearing Clerk, simultaneously with the filing of the required number of copies of the document, an affidavit of service executed by any person 18 years of age or older or a certificate of service executed by an attorney-at-law qualified to practice before the Commission. The proof of service shall identify the persons served, state that service has been made, set forth the date of service, and recite the manner of service.

§ 12.49 Service of decisions and orders.

A copy of all rulings, opinions and orders of the Presiding Officer and the Commission shall be served by the Hearing Clerk on each of the parties.

§ 12.50 Designation of person to receive service.

The first document filed in a proceeding by or on behalf of any party subsequent to formal service of the complaint shall state on the first page thereof the name and post office address of the person who is authorized to receive service for him of all documents filed in the formal proceeding. Thereafter, service of documents shall be made upon the person authorized unless service on the party himself is ordered by the Presiding Officer or the Commission, or unless no person authorized to receive service can be found or unless the person authorized is changed by the party upon due notice to all other parties.

§ 12.51 Filing of documents with the Hearing Clerk.

All documents which are required to be served upon a party shall be filed concurrently with the Hearing Clerk. A document shall be filed by delivering it in person or by certified or registered mail with return receipt requested to:

Hearing Clerk, Office of Hearings and Appeals, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, D.C. 20581.

To be timely filed a document must be received by the Hearing Clerk within the time prescribed for filing.

[41 FR 3999, Jan. 27, 1976, as amended at 41 FR 28260, July 9, 1976]

§ 12.52 Formalities of filing.

(a) *Number of copies.* Unless otherwise specifically provided, an original and five conformed copies of all documents shall be filed with the Hearing Clerk.

(b) *Title page.* All documents filed with the Hearing Clerk must include at the head thereof, or on a title page, the name of the Commission, the docket number and title of the proceeding, the subject of the particular document and the name of the person in whose behalf the document is being filed. In the complaint the title of the action shall include the names of all the complainants and respondents, but in documents subsequently filed it is sufficient to state the name of the first complainant and first respondent named in the complaint with an appropriate indication of other parties.

(c) *Paper, spacing, type.* All documents filed under this Part shall be typewritten, mimeographed, printed, or otherwise reproduced by a process that produces permanent and plainly legible copies, shall be on one grade of good unglazed white paper no less than 8 or more than 8½ inches wide and no less than 10½ or more than 14 inches long and shall be bound on the top only. They shall be double-spaced, except for long quotations (3 or more lines) and footnotes which should be single-spaced. If printed, the documents shall be in either 10- or 12-point type with double-leaded text and single-leaded quotations and footnotes.

(d) *Signatures.* The original copy of all papers must be signed in ink by the person filing the same or by his duly authorized agent or attorney.

(e) *Length and form of briefs.* All briefs filed with the Hearing Clerk containing more than 10 pages shall include an index and a table of cases and other authorities cited. The date of each brief must appear on its front cover or title page and on its signature page. No brief shall exceed 60 pages in length, except with the permission of the Presiding Officer or, by the Commission, to whomever the brief is directed.

§ 12.53 Subscription.

(a) *By whom.* Motions and answers thereto, briefs and other documents filed with the Commission shall be subscribed:

(1) By the person or persons on whose behalf they are tendered for filing;

(2) By a partner, officer or director of a partnership, corporation, association, or other legal entity; or

(3) By an attorney-at-law having authority with respect thereto.

The Hearing Clerk may require appropriate evidence the authority of a person subscribing a document on behalf of another person.

(b) *Effect.* The signature on any document of any person acting either for himself or as attorney or agent for another constitutes certification by him that:

(1) He has read the document subscribed and knows the contents thereof;

(2) If executed in any representative capacity, it was done with full power and authority to do so;

(3) To the best of his knowledge, information and belief, every statement contained in the document is true and not misleading; and

(4) The document is not being interposed for delay.

(c) *Sham documents.* If a document is not signed or is signed with an intent to defeat the purpose of this rule, it may be stricken as sham or false. For a willful violation of this rule an attorney or representative for any party may be subjected to appropriate disciplinary action pursuant to § 12.11. Similar action may be taken if scandalous matter is inserted.

Subpart E—Prehearing Conferences; Discovery and Summary Disposition

§ 12.61 Conferences; procedural matters.

(a) At any time after institution of a formal adjudicatory proceeding as provided in § 12.31 the Administrative Law Judge may direct that one or more conferences be held, in person or by telephone, for the purposes of:

(1) Clarifying issues;

(2) Examining the possibility of obtaining stipulations, admissions of fact and of authenticity of contents of documents;

(3) Determining matters of which official notice may be taken;

(4) Discussing amendments to pleadings;

(5) Limiting the number of witnesses; or

(6) Promoting a fair and expeditious hearing.

At or following the conclusion of a prehearing conference, the Administrative Law Judge shall serve a prehearing memorandum containing agreements reached and any procedural determinations made by him unless the conference shall have been recorded and transcribed in written form and a copy of the transcript has been made available to each party.

(Pub. L. 93-463, Secs. 101, 106, 88 Stat. 1391, 1393 (7 U.S.C. 2a(11), 18).)

[42 FR 16114, Mar. 24, 1977]

§ 12.62 Discovery.

(a) *Methods.* Parties may obtain discovery of a party or an officer or agent of a party by the following methods in accordance with the procedures set forth in the section indicated:

(1) Production of documents or other items (§ 12.63);
(2) Depositions on written interrogatories (§ 12.64);
(3) Admissions (§ 12.65).

(b) *Scope.* The scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending proceeding, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Protective orders.* Upon motion directed to the Presiding Officer by a party or by the person from whom discovery is sought, and for good cause shown, any order which justice requires may be issued to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding, or the inappropriate disclosure of trade secrets or sensitive commercial or financial information. Relief through a protective order may include one or more of the following:

(i) That discovery not be had;
(ii) That discovery may be had only on specified terms and conditions;
(iii) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
(iv) That a trade secret or other confidential commercial information not be disclosed or be disclosed only in a designated way;
(v) That the parties simultaneously file specified documents or information in sealed envelopes to be opened only as directed by the Presiding Officer or the Commission.

(c) *Time limit.* Discovery by all parties will be completed within such time as the Presiding Officer directs from either the date the answer is served on complainant or the date the reply is served on the respondent if the answer contains a counterclaim.

§ 12.63 Production of documents and tangible things.

Any party, within the time prescribed for discovery by the Presiding Officer, may serve on any other party, a notice to produce copies of specifically designated categories of documents, papers, books, accounts, letters, photographs, objects, or tangible things which would constitute or contain evidence relating to any matter, which is relevant to the subject matter involved in the pending proceeding, and which is in the party's possession, custody or control. A copy of the notice shall be served on all other parties to the proceeding. All documents requested in the notice to produce shall be served on the party seeking the discovery within twenty (20) days after service of the notice to produce.

§ 12.64 Depositions on written interrogatories.

(a) *Notice.* Any party, within the time prescribed for discovery by the Presiding Officer, may serve on any other party or any officer or agent of a party a notice of the taking of a deposition on written interrogatories.

(b) *Reply.* (1) Each interrogatory served shall be answered by the party

served or if the party is a corporation, partnership, association, or government agency, by any officer or agent thereof selected by the responding party.

(2) Each interrogatory shall be answered separately and fully in writing, unless objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed and verified by the person making them. The person upon whom a notice to take a deposition on written interrogatories have been served shall serve a copy of the answers and objections within the time period designated by the party submitting the interrogatories but not less than twenty (20) days after service thereof.

(c) *Deposition of a non-party.* The deposition on written interrogatories of a non-party may be taken only within the time prescribed for discovery by the Presiding Officer and only pursuant to an order entered and subpoena issued by the Presiding Officer in accordance with the provisions of § 12.74; *Provided,* That the deposition on written interrogatories of a Commission member or employee may only be taken upon a showing that the Commission member or employee has personal knowledge of the matters sought to be discovered (i.e., not obtained pursuant to a Commission investigation), that the information sought to be discovered is relevant and material and that the information sought to be discovered is not available from other sources.

(d) *Use of depositions on written interrogatories at hearings.* Depositions on written interrogatories may be used against the responding party, except that objection may be made at the hearing to receiving in evidence any interrogatory for any reason which would require the exclusion of the evidence if the party was then present and testifying.

§ 12.65 Admissions.

(a) *Request for admissions.* Any party may serve upon any other party a written request for admission of the truth of any matters relevant to the pending proceeding set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. A copy of the request shall be filed with the Hearing Clerk.

(b) *Reply.* Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within fifteen (15) days after service of the request, or within such shorter or longer time as the Presiding Officer may allow, the party upon whom the request is directed serves upon the party requesting the admission a sworn written answer or objection to the matter. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify his answer and deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give a lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or reasonably available to him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for

trial may not, on that ground alone, object to the request; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) *Determining sufficiency of answers or objections.* The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the Presiding Officer shall order that an answer be served. If the Presiding Officer determines that an answer does not comply with the requirements of this rule, he may order either that the matter is admitted or that an amended answer be served.

(d) *Effect of admission.* Any matter admitted under this rule is conclusively established and may be used at hearing as against the party who made the admission. However, the Presiding Officer may permit withdrawal or amendment when the presentation of the merits of the proceeding will be served thereby and the party who obtains the admission fails to satisfy the Presiding Officer that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

§ 12.66 Consequences of the failure of a party to comply with a discovery notice or request.

If a party or an officer or agent of a party fails to comply with a notice relating to discovery the Presiding Officer may take such action in regard thereto as is just, including but not limited to the following:

(a) Infer that the testimony or documents would have been adverse to the party;

(b) Rule that for the purposes of the proceeding the matter or matters sought to be discovered be taken as established adversely to the party;

(c) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;

(d) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(e) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which discovery was sought, be stricken, or that a decision of the proceeding be rendered against the party, or both. It shall be the duty of parties to seek by motion and Presiding Officer to grant such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony or documents or other evidence.

§ 12.67 Summary disposition.

(a) *Filing of motions, answers.* Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law may move for a summary disposition in his favor of all or any part of the proceeding. Such motion shall be filed at or before the first prehearing conference or at such later time as may be allowed by the Administrative Law Judge. Any adverse party, within 20 days after service of the motion, may serve opposing papers or may countermove for summary disposition.

(b) *Supporting papers.* A motion for summary disposition shall include a statement of material facts as to which the moving party contends there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, admissions, stipulations, and depositions. The motion may also be supported by briefs containing points and authorities in support of the contention of the party

making the motion. When a motion is made and supported as provided in this section, unless otherwise ordered by the Administrative Law Judge, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits or otherwise. He may also submit a brief of points and authorities.

(c) *Oral argument.* Oral argument may be granted at the discretion of the Administrative Law Judge.

(d) *Summary disposition upon the motion of the Administrative Law Judge.* If the Administrative Law Judge believes that there may be no genuine issue of material fact to be determined and that one of the parties may be entitled to a decision as a matter of law, he may direct the parties to submit papers in support of and in opposition to summary disposition, and may hear oral argument, substantially as provided in paragraphs (a), (b), and (c) of this section.

(e) *Ruling on summary disposition.* The Administrative Law Judge shall grant summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and depositions, and matters of official notice show that (1) there is no genuine issue as to any material fact, (2) there is no necessity that further facts be developed in the record, and (3) a party is entitled to a decision as a matter of law.

(f) *Review of ruling; appeal.* An order denying a motion for summary disposition is subject to interlocutory review under the provisions of § 12.47 on the same terms as a ruling on any other motion. An order granting summary disposition may be reviewed by the Commission, in its discretion, in accordance with the provisions of § 12.101 relating to appeals of initial decisions.

(Pub. L. 93-463, Secs. 101, 106, 88 Stat. 1391, 1393 (7 U.S.C. 2a(11) 18))

[42 FR 16114 Mar. 24, 1977]

Subpart F—Hearings

§ 12.71 Oral hearings.

(a) *When required.* (1) Where the amount of damages claimed, either in the complaint or in a counterclaim, is in excess of $2,500 ($5,000 where the complaint is filed with the Commission on or after October 1, 1978) a hearing shall be held in accordance with the procedure set forth in this section unless all the parties have waived their right to a hearing.

(2) Where the amount of damages claimed, either in the complaint or in a counterclaim, does not exceed $2,500, an oral hearing shall not be held, unless ordered by the Commission either on its own motion or upon application by a party setting forth the particular circumstances making an oral hearing necessary for a proper resolution of the issues.

(3) In all cases in which a hearing is not held the procedures set forth in §§ 12.91 through 12.95 shall apply.

(b) *Who may appear.* The parties may appear in person, by counsel or by other representatives of their choosing, subject to the provisions of § 12.11 of these rules, dealing with appearance and practice before the Commission.

(c) *Effect of failure to appear.* (1) If any party to the proceeding, after filing an answer fails to appear at the hearing or any part thereof, he shall to that extent be deemed to have waived the right to an oral hearing in the proceeding. In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present may present his evidence, in whole or in part, in the form of affidavits or by oral testimony, before the Administrative Law Judge.

(2) A failure to appear at a hearing shall not constitute a waiver of a party's right to propose findings of fact based on the record in the proceeding, to propose conclusions of law or to submit briefs, in the manner provided in § 12.82, if the non-appearing party submits prior to the scheduled hearing or within three (3) days thereafter, a Notice of Appearance indicating his intent to continue to participate in the proceeding. Otherwise, his failure to appear will constitute a default and a default order may be sought in accordance with the procedures set forth in § 12.26 of these rules.

(d) *Time and place.* If and when the proceeding has reached the stage of oral hearing, the Administrative Law Judge, giving careful consideration to the convenience of the parties, shall set a time for hearing and shall file with the Hearing Clerk a notice stating the time and place of a hearing. Unless the parties otherwise agree, the place of hearing shall be in a place where the respondent is engaged in business, with due regard given to the convenience of the parties. If any change in the time or place of the hearing becomes necessary, it shall be made by the Administrative Law Judge, who, in such event, shall file with the Hearing Clerk a notice of the change. Such notice shall be served upon the parties, unless it is made during the course of an oral hearing and made a part of the transcript.

(Secs. 2a(11), 8a(5) and 14 of the Commodity Exchange Act, 7 U.S.C. 4a(j), 12a(5) and 18, as amended by Pub. L. 95-405, sec. 21, 92 Stat. 875-6)

[41 FR 4006, Jan. 27, 1976, as amended at 44 FR 12027, Mar. 5, 1979]

§ 12.72 Consolidations.

(a) Where two or more reparation proceedings are based upon complaints alleging substantially similar activities by a respondent affecting the several complainants, the Chief Administrative Law Judge, upon application of any party to any of the proceedings, upon direction by the Commission, or upon his own motion, may join those proceedings for hearing of any or all the matters in issue or may consolidate those proceedings.

(b) Where joinder or consolidation has been ordered, the Administrative Law Judge may make such rulings concerning the conduct of the proceedings as may be necessary to avoid unnecessary costs or delay or prejudice to the participants to the reparation proceedings.

(c) Any party to a reparation proceeding which is consolidated pursuant to this section may seek interlocutory review by the Commission of the order of consolidation in accordance with the procedure set forth in § 12.47(b).

(Pub. L. 93-463, Secs. 101, 106, 88 Stat. 1391, 1393 (7 U.S.C. 2a(11), 18))

[42 FR 16115, Mar. 24, 1977]

§ 12.73 Public hearings.

All hearings shall be public except that upon application of a respondent or affected witness the Administrative Law Judge may direct that specific documents or testimony be received and retained non-publicly in order to prevent unwarranted disclosure of trade secrets or sensitive commercial or financial information or an unwarranted invasion of personal privacy.

§ 12.74 Subpoenas.

(a) *Application for and Issuance of Subpoenas*—(1) *Application for and issuance of Subpoena Ad Testificandum.* An application for a subpoena requiring a person to appear and testify at a reparation proceeding (subpoena ad testificandum) may be made, either orally or in writing by any party without notice to other parties. The application shall be made to the Adminis-

trative Law Judge or in the event that the Administrative Law Judge is not available, to the Chief Administrative Law Judge. Subject to § 12.74(a)(4) a subpoena shall be issued upon the request of any interested party upon tender of an original and two copies of such subpoena.

(2) *Application for Subpoena Duces Tecum.* An application for a subpoena requiring a person to appear and testify and to produce specified documentary or tangible evidence at a reparation proceeding (subpoena duces tecum) shall be submitted in duplicate and in writing, but need not be served upon all other parties. All such applications shall contain a statement or showing of general relevance and reasonable scope of the evidence sought and shall be accompanied by an original and two copies of the subpoena sought which shall describe the documentary or tangible evidence to be subpoenaed with as much particularity as is feasible. Notwithstanding the foregoing, for good cause shown application for a subpoena duces tecum may be made orally during the course of a hearing on the record to the Administrative Law Judge.

(3) *Standards for issuance of Subpoena Duces Tecum.* The Administrative Law Judge considering any application for a subpoena duces tecum shall issue the subpoena requested if he is satisfied the application complies with this section and the request is not unreasonable, oppressive, excessive in scope or unduly burdensome. No attempt shall be made to determine the admissibility of evidence in passing upon an application for a subpoena duces tecum and no detailed or burdensome showing shall be required as a condition to the issuance of any subpoena.

(4) *Denial of application.* In the event the Administrative Law Judge determines that a requested subpoena or any of its terms and unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena, or may issue it only upon such conditions as he determines fairness requires.

(5) *Attendance and mileage fees.* Persons summoned to testify at a hearing under requirement of subpoenas are entitled to the same fees and mileage as are paid to witnesses in the courts of the United States. Fees and mileage shall be paid by the party at whose instance the persons are called.

(b) *Special requirements relating to application for and issuance of subpoenas for Commission records and for the appearance of Commission employees*—(1) *Form.* An application for the issuance of a subpoena shall be made in the form of a written motion served upon all other parties, if the subpoena would require (i) the production of documents, papers, books, physical exhibits, or other material in the records of the Commission; or (ii) the appearance of a Commissioner or an official or employee of the Commission.

(2) *Content.* The motion shall specifically describe, the material to be produced, the information to be disclosed, or the testimony to be elicited from the witness, and shall show (i) the relevance of the material, information, or testimony to the matters at issue in the proceeding; (ii) The reasonableness of the scope of the proposed subpoena; and (iii) that such material, information, or testimony is not available from other sources.

(3) *Rulings.* The motion shall be decided by the Administrative Law Judge or in the event the Administrative Law Judge is not available, by the Chief Administrative Law Judge, and shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the witness as may appear necessary and appropriate

for the protection of the public interest.

§ 12.75 Motions to quash subpoena.

(a) *Application.* Any person upon whom a subpoena has been served may within seven (7) days after service or at any time prior to the return date thereof, whichever is earlier, file a motion to quash or modify the subpoena with the Presiding Officer who issued the subpoena, and serve a copy of such motion upon the party requesting the subpoena. The application shall be accompanied by a brief statement of the reasons therefor. If the Presiding Officer to whom the motion has been directed has not acted upon the motion by the return date, the subpoena date shall be stayed pending his final action.

(b) *Disposition.* After due notice to the person upon whose request the subpoena was issued, and after opportunity for response by that person, the Presiding Officer may (1) quash or modify the subpoena, or (2) condition denial of the application to quash or modify the subpoena upon just and reasonable terms, including, in the case of a subpoena duces tecum, a requirement that the person in whose behalf the subpoena was issued shall advance the reasonable cost of producing documentary or other tangible evidence.

§ 12.76 Service of subpoenas.

(a) *How effected.* Service of a subpoena upon a party shall be made in accordance with § 12.48 except that only one copy of a subpoena need be served. Service of a subpoena upon any other person shall be made by delivering a copy of the subpoena to him as provided in paragraph (b) or (c) of this section and by tendering to him the fees for one day's attendance and the mileage as specified in § 12.74(a)(5). When the subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service.

(b) *Service Upon a Natural Person.* Delivery of a copy of a subpoena and tender of fees and mileage to a natural person may be effected by (1) handing them to the person; (2) leaving them at his office with the person in charge thereof or, if there is no one in charge, by leaving them in a conspicuous place therein; (3) leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; (4) mailing them by registered or certified mail to him at his last known address; or (5) any other method whereby actual notice is given to him and the fees and mileage are timely made available.

(c) *Service Upon Other Persons.* When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees and mileage may be effected by (1) handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; (2) mailing them by registered of certified mail to any such representative at his last known address; or (3) any other method whereby actual notice is given to any such representative and the fees and mileage are timely made available.

§ 12.77 Enforcement of subpoenas.

Upon failure of any person to comply with a subpoena issued at the request of a party, that party may petition the Commission in its discretion to institute an action in an appropriate United States District Court for enforcement of that subpoena.

§ 12.78 Record of hearing.

(a) *Reporting and Transcription.* Hearings for the purpose of taking evidence shall be recorded and shall be transcribed in written form under the supervision of the Administrative Law

Judge by a reporter employed by the Commission for that purpose. The original transcript shall be a part of the record and shall be the sole official transcript. Copies of transcripts, except those portions granted nonpublic treatment, shall be available from the reporter at rates not to exceed the maximum rates fixed by the contract between the Commission and the reporter.

(b) *Corrections.* Any party may submit a timely request to the Administrative Law Judge to correct the transcript. Corrections may be submitted to the Administrative Law Judge by stipulation of the parties, or by motion by any party, and upon notice to all parties to the proceeding, the Administrative Law Judge may specify corrections of the transcript. A copy of such specification shall be furnished to all parties and made a part of the record. Corrections shall be made by the official reporter, who shall furnish substitute pages of the transcript, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages shall be retained in the files of the Hearing Clerk.

§ 12.79 Conduct of the Hearing.

(a) *Expedition.* Hearings shall proceed expeditiously and insofar as practicable hearings shall be held at one place and shall continue, without suspension, until concluded.

(b) *Rights of Parties.* Every party shall be entitled to due notice of hearings, the right to be represented by counsel, the right to cross-examine witnesses, present oral and documentary evidence, raise objections, make arguments and move for appropriate relief.

(c) *Examination of Witnesses.* All witnesses at a hearing for the purpose of taking evidence shall testify under oath or affirmation, which shall be administered by the Administrative Law Judge. A witness may be cross-examined by each adverse party and, in the discretion of the Administrative Law Judge, may be cross-examined, without regard to the scope of direct examination, as to any matter which is relevant to the issues in the proceeding.

(d) *Exhibits.* The original of each exhibit introduced in evidence or marked for identification shall be filed and retained in the docket of the proceeding, unless the Administrative Law Judge permits the substitution of copies for the original documents. A copy of each exhibit introduced by a party or marked for identification at his request shall be supplied by him to the Administrative Law Judge and to each other party to the proceeding.

§ 12.80 Evidence.

(a) *Admissibility.* Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and unduly repetitious evidence shall be excluded.

(b) *Official notice.* (1) Official notice may be taken of:

(i) Any material fact which might be judicially noticed by a district court of the United States; or

(ii) Any matter in the public official records of the Commission.

(2) If official notice is requested or taken of a material fact, any party, upon timely request, shall be afforded an opportunity to establish the contrary.

(c) *Objections.* A party shall timely and briefly state the grounds relied upon for any objection made to the introduction of evidence. If a party has had no opportunity to object to a ruling at the time it is made, he shall not thereafter be prejudiced by the absence of an objection.

(d) *Exceptions.* Formal exception to an adverse ruling is not required. It shall be sufficient that a party, at the time the ruling is sought or entered,

makes known to the Administrative Law Judge the action he wishes the Administrative Law Judge to take or his objection to the action being taken and his grounds therefor.

(e) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness, or the Administrative Law Judge may, in his discretion, receive the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

(f) *Affidavits.* Affidavits may be admitted by the Administrative Law Judge only if the evidence is otherwise admissible and the parties agree that affidavits may be used.

(g) *Stipulations.* Stipulations may be received in evidence at a hearing and when received in evidence shall be binding on the parties thereto.

(h) *Official government records.* An official government record or any entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record or by his deputy, accompanied by a certificate that such officer has custody. If the office in which the record is kept is within the United States the certificate may be made by a judge of a court of record in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by any officer in the Foreign Service of the United States stationed in the foreign state or country in which the record is kept and authenticated by the seal of his office. A written statement signed by an officer having custody of an official record or by his deputy, that after diligent search, no record or entry dealing with a specific matter is found to exist, accompanied by a certificate as provided above, is admissible as evidence that the records of his office contain no such record or entry.

(i) *Entries in the regular course of business.* Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it shall appear that it was made in the regular course of business by a person who had a duty to report or record it.

§ 12.81 Filing the transcript of evidence.

As soon as practicable after the close of the hearing, the reporter shall transmit to the Hearing Clerk the transcript of the testimony and the exhibits introduced in evidence at the hearing, except such portions of the transcript and exhibits as shall have been delivered to the Administrative Law Judge.

§ 12.82 Proposed findings and conclusions; briefs.

In any proceeding involving a hearing or an opportunity for hearing, the parties may file written proposed findings and conclusions of law. Briefs may be filed in support of proposed findings either as part of the same document or in a separate document. Any proposed finding or conclusion not briefed may be regarded as waived.

(a) *Proposed Findings and Briefs; Time for Filing.* Where the parties file proposed findings and briefs, the following schedule shall apply, unless otherwise determined by the Administrative Law Judge:

(1) *Initial submission.* Proposed findings, conclusions and an initial brief shall be served and filed by the complainant within forty-five (45) days of the close of the hearing;

(2) *Answering submission.* Proposed findings, conclusions, and an answering brief shall be served and filed by the respondents within thirty (30) days after service of the initial conclusions and brief upon the respondents;

(3) *Reply.* A reply brief may be filed by the complainant within fifteen (15) days after service of the answering brief.

(b) *Alternative procedures for submissions.* In his discretion the Administrative Law Judge may lengthen or shorten the periods for the filing of submissions, may direct simultaneous filings, may direct that respondents make the first filing, or may otherwise modify the procedures set forth in § 12.82(a) for purpose of a particular proceeding.

(c) *Briefs.* (1) The initial brief should include:

(i) A short, clear and concise statement of the case;

(ii) Specification of the questions intended to be urged; and

(iii) The argument, presenting clearly the points of fact and law relied upon in support of the position taken on each question.

(2) The answering brief shall generally follow the same style as prescribed for the initial brief but may omit a statement of the case if the party does not dispute the statement of the case contained in the initial brief;

(3) Reply briefs should be limited to rebuttal of matters in the prior briefs.

(d) *Content and form of proposed findings and conclusions.* (1) The findings of fact shall be confined to the material issues of fact presented on the record, with exact citations to the transcripts of record and exhibits in support of each proposed finding.

(2) The proposed findings and conclusions of the party filing initially shall be set forth in consecutively numbered paragraphs and all counterstatements of proposed findings and conclusions shall, in addition to any other matter, indicate which paragraphs of the initial proposals are not disputed.

§ 12.83 Oral arguments.

In his discretion the Administrative Law Judge may hear oral arguments by the parties any time before he files his initial decision with the Hearing Clerk. The argument shall be recorded and transcribed in written form.

§ 12.84 Initial decision.

(a) *When initial decision is required.* The Administrative Law Judge shall make an initial decision in each reparation proceeding in which a hearing has been conducted.

(b) *Content of initial decision.* In his initial decision the Administrative Law Judge shall determine whether or not the respondent has violated any provision of the Act or any rule, regulation or order thereunder. If after a hearing, or upon failure of a respondent to appear at a hearing after being duly notified, the Administrative Law Judge determines that the respondent has violated any provision of the Act, or any rule, regulation, or order thereunder, the Administrative Law Judge shall, unless the respondent has already made reparation to the complainant, determine the amount of damage, if any, to which the complainant is entitled as a result of such violation and shall make an order directing the respondent to pay to the complainant such amount on or before a date fixed in the order.

(c) *Costs.* The Administrative Law Judge may, in the initial opinion, award costs (including the cost of instituting the proceeding, should the complainant prevail) to the party in whose favor a judgment is entered.

(d) *Filing of initial decision and order.* The Administrative Law Judge as soon as practicable after the final

date allowed for filing proposed findings of fact and briefs, or such other time as may be allowed by the Chief Administrative Law Judge, or by the Commission, shall prepare upon the basis of the record and shall file with the Hearing Clerk his decision and order, a copy of which shall be served by the Hearing Clerk upon each of the parties.

(c) *Effect of initial decision.* The initial decision and order shall become the final decision and order of the Commission thirty (30) days after service thereof, except:

(1) The decision shall not become final as to a party who shall have filed an application for review in accordance with § 12.101, pending Commission disposition of the application or, if the application is granted, pending the final decision by the Commission upon review of the initial decision.

(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

In the event that the initial decision becomes the final decision of the Commission with respect to a party, that party shall be duly notified thereof by the Hearing Clerk. The notice shall state that the time for filing an application for review by the party has expired, that the Commission has determined not to review the initial decision on its own initiative and shall specify the date on which a final order in the proceeding shall become effective as against that party.

Subpart G—Summary Proceedings

§ 12.91 Presiding Officer; evidence.

In all cases in which a hearing is not held, as provided in § 12.71:

(a) A Presiding Officer shall be appointed who is a member of the Commission, an Administrative Law Judge, a Hearing Officer or other such Commission employee as may be appointed by the Commission to conduct the proceeding; and

(b) Proof in support of the complaint and in support of the respondent's answers may be found in those verified documents and may also be supplied in the form of depositions or other verified statements of fact.

§ 12.92 Discovery.

Parties to a summary proceeding may obtain discovery by the methods and in the manner set forth above in §§ 12.62 through 12.66. Copies of all depositions upon written interrogatories and other verified statements obtained through discovery shall be filed in the proceeding by the party on whose behalf the discovery was obtained.

§ 12.93 Submission of evidence.

Each party shall serve and file those depositions and other verified statements of fact upon which he relies in support of his pleadings. Thereafter, the parties shall have fifteen (15) days to file replies to such submitted affidavits or verified statements of fact to which they have not previously replied. All such replies shall be confined to the matters set forth in the affidavits and verified statements of fact to which they are responsive.

§ 12.94 Proposed findings and conclusions; briefs.

The parties may file written proposed findings and conclusions and may file briefs under the same conditions as are set forth in § 12.82 with respect to proceedings involving a hearing or an opportunity for hearing.

§ 12.95 Initial decision.

(a) *When initial decision is required.*

The Presiding Officer shall make an initial decision in each reparation proceeding not involving a hearing or an opportunity for hearing.

(b) *Consent of initial decision.* In his initial decision the Presiding Officer shall determine whether or not the respondents have violated any provision of the Act or any rule, regulation, or order thereunder. If on the basis of the verified pleadings, depositions and other verified documents designated by the parties, the Presiding Officer determines that the respondent has violated any provision of the Act, or any rule, regulation, or order thereunder, the Presiding Officer shall, unless the respondent has already made reparation to the complainant, determine the amount of damage, if any, to which the complainant is entitled as a result of such violation and shall make an order directing the respondent to pay to the complainant such amount on or before a date fixed in the order.

(c) *Costs.* The Presiding Officer may, in the initial opinion, award costs (including the cost of instituting the proceedings, should the complainant prevail) to the party in whose favor a judgment is entered.

(d) *Filing of initial decision and order.* The Presiding Officer as soon as practicable after the final date allowed for filing proposed findings of fact and briefs, or such other time as may be allowed by the Chief Administrative Law Judge, or by the Commission, shall prepare upon the basis of the record and shall file with the Hearing Clerk his decision and order, a copy of which shall be served by the Hearing Clerk upon each of the parties.

(e) *Effect of initial decision.* The initial decision and order shall become the final decision and order of the Commission thirty (30) days after service thereof, except:

(1) The initial decision shall not become final as to a party who shall have filed an application for review in accordance with § 12.101, pending Commission disposition of the application or, if the application is granted, pending the final decision by the Commission upon review of the initial decision.

(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

In the event that the initial decision becomes the final decision of the Commission with respect to a party, that party shall be duly notified thereof by the Hearing Clerk. The notice shall state that the time for filing an application for review by the party has expired, that the Commission has determined not to review the initial decision on its own initiative and shall specify the date on which a final order in the proceeding shall become effective as against that party.

Subpart H—Commission Review of Initial Decisions in Reparation Proceedings

§ 12.101 Application for Commission review.

Upon application for review by any party or upon its own motion the Commission may, in its discretion, grant review of an initial decision.

(a) *Applications and Responses.* (1) An application for Commission review of an initial decision must be served and filed in accordance with §§ 12.48 and 12.49 within fifteen (15) days after service upon the parties of the initial decision;

(2) An application for review shall (i) identify the party seeking review; (ii) specify the issues presented for review; (iii) identify those provisions of the Act or any rule, regulation or order